Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

MONTY J. REKDAHL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE

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QUESTION PRESENTED

Whether the $4 million punitive damage award imposed in this case is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Sara M. Rekdahl and Owens-Illinois, Inc., were parties in the court below. Pursuant to Rule 29.6 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglass Industries, Ltd.

Arabian Fiberglas Insulation Company

Asahi Fiber Glass Company, Ltd.

Fiberglas Colombia, S.A.

Polyplaster, S.A.

Scandinavian Glasfiber AB

Vitro-Fibras, S.A.

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MONTY J. REKDAHL, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE

Petitioner Owens-Corning Fiberglas Corporation ("OCF") respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division Three in this case.

OPINIONS BELOW

The opinion of the Court of Appeal (App., *infra*, 1a-85a) is not reported. The order of the Superior Court (App., *infra*, 86a) is not reported.

JURISDICTION

The judgment of the Court of Appeal was entered on May 25, 1995. Petitioner filed a timely petition for rehearing, which was denied on June 20, 1995. App., *infra*, 88a-90a. Petitioner then filed a petition for discretionary review in the Supreme Court of California, which was denied on August 24, 1995. App., *infra*, 91a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

I. Factual Background

Respondent Monty Rekdahl worked as a pipefitter for the United States Navy at the Long Beach Naval Shipyard during the 1950s and at naval ship repair facilities in the Pacific during the 1960s and early 1970s. App., *infra*, 3a. He was exposed to asbestos dust in the course of his employment. *Id.* Mr. Rekdahl contracted mesothelioma, a cancer of the pleura (lung lining) believed to be caused by asbestos.

Since its formation in 1938, OCF has engaged primarily in the manufacture of various fiberglass products. Beginning in the 1940s, Owens-Illinois, Inc. ("O-I") manufactured and sold an asbestos-containing insulation product called Kaylo. In 1953, OCF began

selling Kaylo pursuant to a distribution agreement with O-I. In 1958, O-I sold its Kaylo manufacturing operations to OCF, and thereafter OCF manufactured and sold Kaylo until 1972, when OCF ceased production of asbestos-containing Kaylo.

Kaylo contained only a low percentage of asbestos. Moreover, Kaylo did not produce as much airborne dust as other asbestos insulation products. Tests conducted during the 1960s indicated that Kaylo could be manufactured, cut, and used without exceeding the asbestos exposure levels then thought to be safe by government and industry. OCF C.A. Br. 68-69.

In recent years, OCF has been sued by hundreds of thousands of persons claiming to have been injured by exposure to Kaylo. As of March 31, 1993, OCF had already resolved approximately 107,800 asbestos personal-injury claims and had taken a cumulative charge of $943 million against earnings to account for the estimated *uninsured* costs of asbestos claims through 1999. As of February 1994, 38 juries had imposed some $77 million in punitive damages awards on OCF in asbestos cases. OCF C.A. Br. 57-58 & n.24; OCF C.A. Reply Br. 28 & n.7.

II. Proceedings in the Trial Court

Mr. Rekdahl and his wife, respondent Sara Rekdahl, sued various former manufacturers of asbestos products in California state court for personal injuries allegedly arising out of exposure to the defendants' products. All defendants other than OCF and O-I settled prior to or during trial. App., *infra*, 3a.

The trial was trifurcated. In Phase I, the jury found that Mr. Rekdahl's injury was caused by exposure to asbestos and awarded him $964,219 in economic damages and $2.5 million in noneconomic damages. App., *infra*, 4a. Mrs. Rekdahl was awarded $1 million in damages for loss of consortium. *Id.*

In Phase II, the jury found that Kaylo was defective and that the defect was a legal cause of Mr. Rekdahl's injury. App., *infra*, 4a-5a. The jury determined that OCF and O-I were each responsible for 42.5 percent of Mr. Rekdahl's injury. *Id.* at 5a. Moreover, even though OCF introduced evidence showing that OCF's Kaylo product complied with existing government and industry safety standards (*see* OCF C.A. Br. at 69-71), the jury found that punitive damages should be imposed. App., *infra*, 5a. In Phase III, the jury imposed $4 million in punitive damages against OCF (and an additional $4 million against O-I). *Id.*

OCF filed a timely motion for a new trial or a remittitur, asserting, *inter alia*, that the jury's $4 million award of punitive damages violates the federal Due Process Clause. In this regard, OCF argued that "[a]warding punitive damages against OCF in this case will violate the Constitution as well as California law" because "[i]rrational or arbitrary government action violates the constitutional guarantee of due process" and "[t]he imposition of punitive damages is unconstitutional if it serves no rational deterrent or punitive purpose." C.A. Rec. 3179 (citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)). OCF explained that the punitive damage award violates the Due Process Clause in part because (1) OCF has already suffered "massive punishment" for its long-past

distribution of Kaylo, eliminating any need for further punishment or deterrence, C.A. Rec. 3181; (2) there is a "lack of rationality in the imposition of multiple punitive damage awards" in the mass-tort context for injuries arising out of the same course of conduct, *id.* at 3182; and (3) "[t]he $4 million punitive award in this case also serves no legitimate deterrent (or punitive) purpose because OCF is being punished for conduct that fully complied with government safety standards," *id.* at 3186; *see generally id.* at 3179-87, 3194-3200.

The trial court denied OCF's motion without explanation. App., *infra*, 86a-87a.

III. Proceedings on Appeal

OCF appealed to the California Court of Appeal. OCF again contended, *inter alia*, that the award of punitive damages is unconstitutionally excessive in violation of the federal Due Process Clause. *See* OCF C.A. Br. 56-74; OCF C.A. Reply Br. 25-32.

In particular, OCF argued that the award is unconstitutionally excessive in view of the multiple and widely varying awards already imposed, and likely to be imposed in the future, on OCF in other cases. OCF C.A. Br. 56-61. OCF explained that "[t]he award of punitive damages does not rationally advance any interest California may have in deterring or punishing misconduct because OCF has already incurred significant liability for compensatory and punitive awards that exceed by hundreds of millions of dollars the profit OCF made from manufacturing and distributing Kaylo." OCF C.A. Br. 56. Pointing out the "inappropriateness of awarding punitive damages in mass-tort cases," OCF argued that "[m]ultiple punishments for a

single course of conduct . . . constitute the very type of unconstrained and excessive punishment that due process prohibits." *Id.* at 56, 59-60.

In addition, OCF argued that the award violated its federal due process rights because the evidence showed that OCF's product satisfied applicable industry and government safety standards. OCF C.A. Br. 66-73. Noting that "due process precludes the imposition of punitive damage awards except where they are imposed to punish the defendant's 'intentional or egregious misconduct,'" *id.* at 66, OCF argued that an award of punitive damages was precluded because studies indicated "that the dust raised by the ordinary cutting and handling of Kaylo did not exceed [safety] standards" which had been "established by the American Conference of Governmental Industrial Hygienists and adopted by several states." *Id.* at 69, 70. Moreover, OCF complied with OSHA warning-label requirements even before those requirements went into effect. *Id.* at 70-71.

The Court of Appeal affirmed the judgment of the trial court in all pertinent respects. App., *infra*, 1a-85a. Recognizing that OCF had raised claims of "due process violations created by the assessment of punitive damages in mass tort litigation," the court held, unresponsively and without further explanation, that the punitive damage "award is not 'grossly excessive', so as to conclude that it was the result of 'passion or prejudice.'" *Id.* at 59a, 81a. The court ordered a remand to the trial court for the limited purpose of recalculating the settlement offsets applicable to the judgment amount. *Id.* at 84a-85a ("[t]he matter is remanded to the trial court for a hearing, with factual and legal

findings, *only* on the issue of setoffs against the judgment for pretrial settlements and, if required, a recalculation of the judgment and entry of an amended judgment. In all other respects, the judgments . . . are affirmed.") (emphasis in original).

OCF filed a petition for rehearing, which was denied on June 20, 1995. App., *infra*, 88a-90a. OCF then filed a petition for discretionary review in the Supreme Court of California. OCF argued, *inter alia*, that the punitive damage award was grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment. Pet. for Review 2-8. OCF explained that "[m]ultiple punishment for a single course of conduct has been recognized . . . to constitute the very type of unconstrained and excessive punishment prohibited by due process" and that "[t]he State's goals of punishment and deterrence are not served by an award of punitive damages against OCF." *Id.* at 6, 7. The court denied review on August 24, 1995. App., *infra*, 91a.

On September 11, 1995, OCF filed an application to stay execution of the judgment with Justice O'Connor, who granted a temporary stay on September 13, 1995. The full Court granted a stay of the punitive damage portion of the judgment on September 29, 1995. *See Owens-Corning Fiberglas Corp. v. Rekdahl*, No. A-241.

THE JUDGMENT BELOW FINALLY RESOLVES THE FEDERAL QUESTION PRESENTED IN THIS PETITION

This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the

highest court of a State in which a decision could be had . . . where any right, title, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a). This petition presents the question whether the $4 million punitive damage award imposed on OCF is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment. As described above, that federal constitutional question was presented to, and decided by, the California Court of Appeal. Moreover, OCF sought to raise that question in the Supreme Court of California, but that court denied review. Accordingly, OCF is plainly seeking review of a decision "rendered by the highest court of a State in which a decision could be had . . . where any right, title, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." 28 U.S.C. § 1257(a).

The judgment below is unquestionably final for purposes of this Court's certiorari jurisdiction. Although the California Court of Appeal remanded the case for the limited purpose of correcting the settlement offset amount reflected in the judgment, that remand does not involve any disputed federal issues, all of which were finally resolved by the Court of Appeal's opinion below. Instead, the remand is limited to the essentially ministerial act of correcting the judgment amount to include all settlement offsets in accordance with the guidance provided in the Court of Appeal's opinion. As such, the remand does not deprive the judgment below of finality for purposes of this Court's jurisdiction. *See, e.g., Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953) (finality requirement satis-

fied where "nothing remains to be done but the mechanical entry of judgment by the trial court"); *see generally* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 3.6 (1993).

Moreover, because the limited proceedings on remand will have no impact on the size of the punitive damage award and thus will not affect in any way the federal question presented in this petition, "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975). Indeed, in precisely this situation, the Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982), held that a state appellate court's federal constitutional ruling was final for purposes of certiorari review even though the state court had remanded the case for recomputation of damages. Accordingly, the judgment below is final, and this Court has jurisdiction to review this case under 28 U.S.C. § 1257(a).

REASONS FOR GRANTING THE WRIT

I. The $4.125 Million Award of Punitive Damages Is Grossly Excessive In Violation Of The Due Process Clause And The Factors Presented In The *BMW* Case

As this Court has recognized, "the Constitution imposes a substantive limit on the size of punitive damage awards." *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335 (1994). In *BMW of North America, Inc. v. Gore*, No. 94-896 (argued Oct. 11, 1995), this Court granted certiorari to decide, *inter alia*, what standards are to be applied in determining whether a punitive

damage award is unconstitutionally excessive. *See* Pet. for Cert. in No. 94-896 ("*BMW* Pet.") at I (raising question whether the challenged punitive award "is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment"). BMW's petition for a writ of certiorari pointed to various factors that demonstrate the excessiveness of the award in that case. *See BMW* Pet. 18-25.

In this case, of course, OCF has consistently argued that the punitive damage award violates the substantive component of the Due Process Clause. *See supra* pp. 4-7. Moreover, many of the precise factors that demonstrate the excessiveness of the award in *BMW* are also present here, making this case a particularly strong candidate for review. For example, BMW argues in its brief on the merits that its compliance with statutory disclosure standards adopted in numerous States eliminates any justification for a large award of punitive damages. *BMW* Pet. Br. 37-40 & n.23. Similarly, BMW argues that "adherence to industry custom . . . constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant *any* punitive exaction, let alone one of enormous size." *BMW* Pet. Br. 40-41; *see BMW* Pet. 18-19.

In this case, OCF likewise argues vigorously that the award violates its federal due process rights because the evidence showed that OCF's product complied with the standards "established by the American Conference of Governmental Industrial Hygienists and adopted by several states." OCF C.A. Br. 69, 70. Moreover, OCF complied with OSHA warning-label requirements even before those requirements went into effect. *Id.* at

70-71. Thus, essentially the same factors relied upon by BMW are at issue in this case as well.

In addition, BMW argues at length that the punitive award is unconstitutionally excessive in part because the *BMW* case involves a "mass tort" and therefore creates the potential for multiple punitive awards arising out of the same course of conduct. *BMW* Pet. Br. 45-50. As BMW asserts, "[t]he question to be asked is: if every other plaintiff recovered the same amount of punitive damages, would the resulting punishment be excessive?" *Id.* at 46; *see also BMW* Pet. 21.

Once again, precisely the same factor is present in this case. OCF has consistently argued that the excessiveness of the punitive damages award imposed in this case is demonstrated by the existence of, and potential for, numerous other claims of injury and punitive awards arising out of the same course of conduct, *i.e.*, OCF's manufacture and distribution of asbestos-containing Kaylo. OCF C.A. Br. 56-61; OCF C.A. Reply Br. 25-32; *see supra* pp. 3-7. Just as in *BMW*, moreover, the award at issue in this case would plainly be excessive "if every other plaintiff recovered the same amount of punitive damages." *BMW* Pet. Br. 46.

In short, this case raises the same question as that presented in *BMW*, and it does so in a very similar legal and factual setting. Given the obvious and substantial similarities between the two cases, it is readily apparent that a favorable decision in *BMW* would have a direct and substantial impact on the outcome of this case. Indeed, OCF's application for a stay of execution was predicated on the substantial similarities

between this case and *BMW*, and the full Court found a sufficient probability of success to justify issuance of a stay. That determination amply supports OCF's contention that, at the very least, the question presented in this petition is likely to be affected by the resolution of the *BMW* case. Accordingly, this petition should be held pending the Court's decision in *BMW* and then disposed of in light of the disposition of that case.

II. The Lower State And Federal Courts Are Divided Over The Standards To Be Applied In Reviewing Punitive Damage Awards

The *BMW* petition argues persuasively that, despite this Court's prior decisions in this area,[1] punitive damage awards continue to skyrocket and the lower state and federal courts continue to apply inconsistent standards and reach conflicting results in reviewing the size of punitive damage verdicts. *BMW* Pet. 26-29. Thus, the *BMW* petition demonstrates that the lower federal and state courts are in substantial need of additional guidance on the proper approach to the excessiveness inquiry. This Court's decision to grant review in *BMW* establishes the importance and significance of that question. Review of that same question would therefore be warranted in this case if the Court's disposition of *BMW* were to leave that question unresolved.

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[1] *See, e.g., Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Indeed, this case is a particularly strong candidate for review in that regard, because the decision below is directly inconsistent with the decision of the Third Circuit in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.) (en banc), *cert. denied*, 114 S. Ct. 650 (1993), which involved an asbestos personal injury suit against OCF arising out of the same course of conduct at issue here. In *Dunn*, the Court of Appeals held that the district court gave "insufficient consideration to the effect of successive punitive awards in asbestos litigation" when it remitted a $25 million award against OCF to $2 million. 1 F.3d at 1391. Accordingly, the en banc court further reduced the award against OCF to $1 million, explaining that an award of that size was "the *maximum* amount of punitive damages that could reasonably have been awarded in this case." *Id.* (emphasis added).[2]

Similarly, numerous other courts have emphasized that the existence of, or potential for, other punitive damage awards against the same defendant for the same course of conduct raises due process concerns and is an appropriate factor to be considered in determining whether a particular award is grossly exces-

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[2] Five members of the court dissented on the ground that the Due Process Clauses bars *any* further awards of punitive damages against OCF because the amounts already awarded in prior litigation are more than necessary to achieve fully the goals of punishment and deterrence. *Id.* at 1400-05 (Weis, J., dissenting, joined by Greenberg, Hutchinson & Scirica, JJ.); *id.* at 1405 (Becker, J., dissenting).

sive.[3] Although OCF argued this point at length to the Court of Appeal (*see* OCF C.A. Br. 56-61), that court (unlike the Third Circuit in *Dunn v. HOVIC*) was unpersuaded. Plenary review of this issue is therefore warranted if this Court's disposition of *BMW* does not itself require reconsideration of the judgment in this case.

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[3] *See, e.g.*, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (citing with approval the Alabama Supreme Court's consideration of "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation"); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992) (en banc) (*Haslip* requires consideration of "other civil or criminal penalties levied on the defendant"); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991); *see also In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.), *cert. denied*, 479 U.S. 852 and *cert. denied*, 479 U.S. 915 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840-41 (2d Cir. 1967) (Friendly, J.); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234, 1236 (D.N.J. 1989) ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

CONCLUSION

The petition for a writ of certiorari should be held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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November 22, 1995

APPENDIX

APPENDIX

APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE
[Filed May 25, 1995]

MONTY J. REKDAHL and SARA M. REKDAHL, Plaintiffs, Cross-Appellants and Respondents, v. OWENS-CORNING FIBERGLAS CORPORATION and OWENS-ILLINOIS, INC., Defendants, Cross-Respondents and Appellants.	2d Civil No. B068259 (Super. Ct. No. BC029081

APPEALS from judgments of the Superior Court of Los Angeles County. Newell A. Barrett, Judge, retired. Affirmed with directions.

Howarth & Smith, Don Howarth and David K. Ringwood; Wright, Robinson, McCammon, Osthimer & Tatum and Robert A. Rich; Gibson, Dunn & Crutcher, Larry L. Simms, Deborah M. Rosenberg, John K. Bush, and Alicia J. Bentley, for Defendants, Cross-Respondents and Appellants.

Davis & Thomas, Joseph Daniel Davis and Thomas D. Thomas; Charlotte E. Costan, for Plaintiffs, Cross-Appellants and Respondents.

In an asbestos-related personal injury action, defendants and appellants Owens-Corning Fiberglas Corporation (OCF) and Owens-Illinois, Inc. (OI) (collectively referred to as defendants or appellants) appeal from the judgment entered following a jury verdict in which plaintiffs, respondents, and cross-appellants Monty J. Rekdahl and Sara M. Rekdahl (collectively referred to as Rekdahl) were awarded compensatory damages in the sum of $4,464,219 and punitive damages in the sum of $8 million, and after the denial of each of their motions for judgment n.o.v. and a new trial.

Rekdahl cross-appeals from the trial court's determination that Los Angeles Superior Court's General Order No. 37.01 properly defined the application of Proposition 51 to asbestos personal injury cases.

On appeal, we find the trial court did not commit any evidentiary or instructional error that deprived defendants of their rights under Proposition 51. We further find the punitive damage award did not violate tenets of due process or California law. However, the matter is remanded to the trial court for the limited purpose of determining setoffs against the judgment for pretrial settlements and modification of the judgment. In all other respects, the judgment is affirmed.

On the cross-appeal we find Proposition 51 applicable to this case. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal concerns the propriety of numerous trial court rulings and their effect on the allocation of non-economic damages under Proposition 51 and the jury's decision to award punitive damages. The matter arises from an action for personal injuries against manufacturers of asbestos-containing products.

Rekdahl worked as a pipefitter for the United States Navy at the Long Beach Naval Shipyard (Shipyard) in the 1950's, and at a ship repair facility in Guam in the 1960's and early 1970's. His work exposed him to asbestos dust. Rekdahl became ill, experiencing respiratory problems. In April 1991, he was diagnosed with malignant mesothelioma, a fatal asbestos-related cancer.

On May 23, 1991, Rekdahl filed a complaint for asbestos-related personal injuries and named five defendants, including OCF and OI. The gravamen of Rekdahl's complaint was that he had been exposed to each of the defendants' asbestos products, which they knew to be harmful, and as a result suffered his injuries.[1] OCF and OI both filed answers, and OCF filed a cross-complaint for contribution, comparative indemnity and declaratory relief against the Manville Asbestos Disease Compensation Fund.

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[1] Rekdahl asserted causes of action for negligence, breach of warranty and strict liability. Defendants Fibreboard Corporation and Pittsburgh Corning Corporation settled prior to the completion of the trial, and Thorpe Insulation Company was never served in this action.

The case was specially set for trial in January 1992. The trial court trifurcated the trial, with medical causation and compensatory damages being tried in Phase I, liability issues in Phase II, and, if necessary, punitive damages in Phase III.[2]

Trial on Phase I began January 21, 1992. The issue was whether Rekdahl had a malignant mesothelioma or some other form of carcinoma. At the conclusion, the jury returned a special verdict finding that Rekdahl had a malignant mesothelioma caused by exposure to asbestos, and awarded him $964,219 in economic damages and $2,500,000 in non-economic damages. Sara Rekdahl was awarded $1 million in damages for her loss of consortium claim.

Trial on Phase II began February 10, 1992. The focus was on the extent to which Rekdahl had been exposed to specific brands of asbestos products, including those produced by OCF and OI. At the conclusion, the jury returned a special verdict finding there was a defect with both OCF and OI's product Kaylo, the defect existed when Kaylo left defendants' possession, the defect was the legal cause of Rekdahl's injury, and the

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[2]Judge Kurt J. Lewin ruled on matters during pretrial proceedings and, specifically, that the case be trifurcated and given preference. The case was tried before Judge Newell Barrett (Ret'd. and now deceased), sitting by special assignment. However, the parties continually went back and forth between the two courts to obtain rulings and clarifications of rulings on the admissibility of evidence. Unless there is a reason for specific reference to either Judge Lewin or Judge Barrett, we will consider their rulings interchangeable and refer to them as "the trial court".

injury resulted from the use of the product that was reasonably foreseeable to OCF and OI.[3] The jury found OCF and OI, each, 42.5 percent of the legal cause of Rekdahl's injury, and other known parties were apportionately responsible as follows: Eagle-Picher 1.5 percent, Fibreboard/Pabco 1.5 percent, Johns-Manville 4 percent, Philip Carey 1.5 percent, Pittsburgh-Corning/ Unibestos 1.5 percent, and the U.S. Navy 5 percent. The jury further found OCF and OI acted with malice or fraud and that punitive damages should be imposed.

Trial on Phase III began on or about March 9, 1992. The jury had decided in Phase II to award punitive damages, so the only issue was the amount. At the conclusion, the jury imposed punitive damages in the sum of $4 million against OCF and $4 million against OI.

The judgment was entered on March 16, 1992. OCF and OI each filed post-trial motions to vacate and alter the judgment, requesting setoffs against the judgment

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[3] Kaylo was described as a high temperature calcium silicate insulation that was reinforced with between 13 percent and 20 percent of asbestos fiber. The asbestos in Kaylo was a mixture of chrysotile and amosite fibers. OI produced and marketed Kaylo asbestos containing products from 1943 to 1958, after which it entered into a distribution agreement with OCF whereby OCF would sell OI Kaylo. In 1958, OI sold its Kaylo division to OCF and ceased the manufacture, sale and distribution of asbestos containing products. After 1958, OFC marketed Kaylo under other names for Eagle-Picher, Armstrong Cork and Fibreboard, and rebranded and sold Johns Manville insulation, and Fibreboard insulation (Pabco) and cement, under OCF's name.

for settlements Rekdahl received from Fibreboard and Pittsburgh Corning, and for a claim against the Johns-Manville Trust. Defendants also filed motions for judgment n.o.v. and for a new trial, which the court denied.

OCF and OI each timely filed a notice of appeal. Rekdahl timely filed a notice of cross-appeal.

CONTENTIONS

On appeal, OCF and OI generally contend:[4]

(1) The trial court committed prejudicial evidentiary and instructional error which:

(a) precluded the jury from properly apportioning liability in accord with Proposition 51;

(b) precluded defendants from presenting evidence of absent defendants and other tortfeasors;

(c) precluded defendants from presenting a complete defense; and

(d) led to the imposition of unlawful and excessive punitive damage awards.

(2) The judgment should be amended to reflect Rekdahl's settlements with other related entities.

On cross-appeal, Rekdahl contends the trial court erred in applying Proposition 51 to this case.

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[4]The appellants in this case do not raise issues of substantial evidence. Aside from the punitive damage issue, OCF and OI, each, specifically challenge a substantial number of individual rulings made by the trial court accepting or rejecting certain evidence and jury instructions, which we will address. OI joined in the issues presented by OCF. Unless there is a reason to designate an individual appellant's issue, we will consider the contentions as raised by both OCF and OI.

DISCUSSION

1. The Trial Court Did Not Commit Evidentiary Error.

a. Standard of Review

In considering appellants' numerous evidentiary contentions, we begin our analysis with the premise that a "trial court has very broad discretion in admitting or excluding evidence. [Citation.] Both case law and constitutional authority provide that prejudice is not presumed and must be affirmatively shown. [Citation.] A judgment will not be reversed unless it can be said that a different result would have occurred had asserted error not been made. [Citation.]" (Vossler v. Richards Manufacturing Co. (1983) 143 Cal.App.3d 952, 961, overruled on other grounds in Adams v. Murakami (1991) 54 Cal.3d 105, 114-116; see also Douglas v. Ostermeier (1991) 1 Cal.App.4th 729, 739-740.)

Furthermore, the trial court has broad discretion to determine whether a witness is qualified to testify as an expert and to rule on foundational matters on which expert testimony is to be based. (Korsak v. Atlas Hotels Inc. (1992) 2 Cal.App.4th 1516, 1523; Douglas v. Ostermeier, supra, 1 Cal.App. 4th at p. 738.) "However, the discretion to admit or exclude evidence is not unlimited. 'The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]' [Citations.] [¶] . . . . It is prejudicial error to exclude relevant and material

expert evidence where a proper foundation for it has been laid, and the proffered testimony is within the proper scope of expert opinion. [Citation.] Conversely, the courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (Korsak v. Atlas Hotels, Inc., supra, 2 Cal.App.4th at p. 1523.)

With these legal principles in mind, we consider appellants' claims of error.

b. OCF and OI's Defenses

OCF and OI claim the trial court's erroneous rulings denied them the opportunity to present evidence to support either their causation arguments or the government-contractor defense. We disagree.

(1) Fiber-Type Evidence

Without argument or authority to support their position, OCF and OI contend they were unfairly deprived of the opportunity to present fiber-type testimony by their witnesses Dr. Harry B. Demopoulos (Demopoulos) and Dr. Arthur Langer (Langer) that crocidolite fibers, and not amosite and chrysotile fibers contained in Kaylo, cause mesothelioma. OCF and OI additionally contend the court misinterpreted the trifurcation order in making its ruling. The contentions are without merit.

When the court trifurcated the proceedings in this case, it ordered that "[e]vidence of plaintiff's exposure to asbestos is relevant in Phase I on the medical causation issue. Specific identification of plaintiff's ex-

posure to a particular defendant's asbestos-containing product and/or its chemical composition shall not be relevant nor admissible in Phase I. Such evidence shall be reserved for Phase II liability issues if necessary."

During Phase I, Rekdahl's pathologist, Dr. James Robb (Robb), testified the malignancy on plaintiff's lung was a biphasic malignant mesothelioma. Robb was then asked whether all three of the asbestos fiber types, chrysotile, amocite and crocidolite, led to mesothelioma, when defendant objected on the ground the trifurcation order designated this type of evidence for Phase II. Rekdahl argued the expert testimony was only as to whether or not the three fibers caused mesothelioma, not the particular chemical composition of an individual defendant's product, which is a Phase II issue. The court overruled the objection and permitted Robb's testimony stating, "I don't see what damage . . . it is not going against any particular defendant at this point." Robb further testified all three of the principal asbestos fibers caused mesothelioma, but when asked which fiber was most toxic, defendants' objection to the question was sustained. Defendants had never designated a fiber-type expert.

On February 4, 1992, while the Phase I jury was deliberating, defendants requested from Judge Lewin that their pathologist have the opportunity to conduct a fiber-type analysis on tissue blocks of Rekdahl's pathology defendants had previously tested and analyzed. The court ordered Rekdahl to return to defendants the pathology materials. The court was advised Dr. Arthur Langer, an expert witness not previously designated by defendants, would probably do the fiber

analysis, and Dr. Victor Roggli may be called for rebuttal. The court reserved a ruling on admissibility of the pathology analysis, recognizing a potential problem if Rekdahl could not meet new evidence without a delay in trial, or establish other prejudice. The analysis would be done over the weekend and presented on Monday, February 10, 1992.

On February 10, 1992, the first day of trial in Phase II, defendants informed the court they received Langer's follow-up report and wanted to talk with him before deciding to introduce his testimony or findings.

On February 11, 1992, prior to opening statements, the court and counsel met to discuss the admissibility of Langer's testimony and report. After hearing argument of counsel, the court ruled that neither Langer's testimony nor his pathology report were admissible on the grounds Langer had not been designated as an expert witness, and, his testimony would delay the trial and prejudice Rekdahl because plaintiff would have to locate a witness to rebut defendants' fiber-type analysis. Defendants made an offer of proof for the record that according to Langer's findings there was neither amosite nor crocidolite in the tissues. Langer, though not a medical doctor, would testify that the most likely cause of Rekdahl's tumor was the trimolite fiber. Defendants argued this evidence would exonerate Kaylo as the source of Rekdahl's illness. When defendants further argued Rekdahl could have used Dr. Roggli on rebuttal, Rekdahl responded he had been unable to contact the potential witness, which was a problem with late discovery.

Toward the end of Phase II, OI, by previous joinder to OCF's expert witness list, proffered a fiber-type

defense through its "state of the art" expert, Dr. Harry Demopolous.[5] Rekdahl interposed a prejudice objection to Demopolous' testimony because the doctor had neither been designated as an expert to testify on fiber-type defense nor deposed on the subject because of representations he would only be a state of the art witness for which previous deposition transcripts were available. OCF also objected to Demopolous' fiber-type testimony on grounds it did not consider the doctor a fiber-type expert, it had not designated a fiber-type expert, there had only been a peripheral mention of fibers, and there was no opportunity to prepare for this type of testimony. OCF further argued against evidence of fibers at this late stage of trial.

Demopolous testified about the state of the literature and studies of mesothelioma, but Rekdahl objected when the doctor was asked if he reviewed literature or any studies "that would suggest that amosite or chrysotile alone or together were implicated in connection with mesothelioma." The court sustained the objection determining OI was attempting to create the impression a certain type of fiber could not have created mesothelioma even after being precluded from presenting fiber-type evidence.

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[5] "State-of-the-art" experts provide testimony in failure-to-warn cases of "facts which were either known or discoverable in light of the scientific and technological knowledge available to defendants at the time the products were produced and distributed." (Vermeulen v. Superior Court (1988) 204 Cal.App.3d 1192, 1202; see also Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal.3d 987, 991.)

Contrary to defendants' assertions the trial court did not err in excluding the testimony of Langer and Demopolous. The court did not view this issue as a problem of designation, but one of prejudice.

First, the court correctly precluded their testimony on grounds of prejudice. The late received evidence would have put Rekdahl (and also OCF as to Demopolous) at a disadvantage in that he would be unable to obtain a rebuttal witness without causing a delay in an already lengthy trial. Defendants attempted to subsequently have Demopolous testify on a subject for which he had not been designated an expert, and Rekdahl had not been given an opportunity to depose him. (See Code Civ. Proc., § 2034, subd. (m); Powell v. Superior Court (1989) 211 Cal.App.3d 441, 444-445.) If Demopolous' testimony had been admitted, it would have effectively negated Rekdahl's rights to full and complete discovery. In so excluding the evidence, the court did not abuse its discretion.

Second, defendants' difficulties were self-imposed and the result of their failure to prepare for and designate a fiber-type expert. Defendants' difficulties were not the result of any alleged confusion with the evidentiary requirements in the trifurcation order. Their belated attempts to rectify their error were unsuccessful. The order is clear. Evidence of exposure to asbestos was relevant in Phase I on the issue of medical causation. Therefore, testimony regarding asbestos fiber types would assist the jury in its determination of whether Rekdahl suffered from a mesothelioma or another form of cancer. This testimony would then lay the foundation for causation and product identification testimony in Phase II.

Third, despite defendants' assertions, fiber-type evidence was presented to the jury by another defense witness, Dr. Gerald Kerby, who testified at length about the various types of asbestos fibers, a study which suggested mesotheliomas were caused by crocidolite and not amosite, and a second study which show both crocidolite and amosite caused mesotheliomas. Defendants' own witness explained how, historically, there was a causal link between mesotheliomas and exposure to amosite and crocidolite fibers. Additionally, defendants advised the court they designated Drs. Inkeys and Ayers to testify on the issue of causation, but neither witness was called to testify.

(2) Mathematical Latency Model

OCF contends the trial court erred by excluding the testimony of its witness, Dr. William Hughson (Hughson), concerning the latency aspect of asbestos-related diseases. OCF specifically contends testimony would have demonstrated the probabilities were greater that Rekdahl's early exposures when working at the Shipyard, a time when OCF did not manufacture Kaylo, caused his illness. We disagree.

The court conducted a 402 hearing in response to OI and Rekdahl's objections to Hughson's proposed testimony regarding a mathematical model allegedly designed to calculate the risk of getting mesothelioma by calculating latency periods.

Hughson testified he developed a mathematical formula, based on a series of computations and scientifically accepted latency models, designed to look at the entire period of exposure to asbestos, and to weigh the

exposures and determine the probability the mesothelioma was developed during a specific year or years. The model presupposed uniform exposure year to year, but could be adjusted. Except for an article written by a Dr. Morgan, a paid consultant to the asbestos industry, there was nothing in medical literature regarding use of this model and analysis to assess the likelihood of exposure in an individual, rather than a group. Hughson further testified he had neither used the model in actual practice nor presented this testimony before a jury. Hughson further testified the model was more applicable for exposure to amosite or crocidolite. Additionally, different sets of numbers would have to be used if a product contained mostly chrysotile, because chrysotile asbestos probably did not cause mesothelioma.

The court initially decided to admit the evidence despite objections based on admissibility and Evidence Code section 352. The court stated: "I think everything that you have done goes to the weight. I am not going to exclude it." However, upon realizing Hughson's model did not apply to chrysotile, one of the fiber to which Rekdahl was basically exposed, the court reconsidered its ruling and found "because of the absence of chrysotile from the study, it is fatally flawed." The court would not permit Hughson's testimony.

The record reflects the court excluded Hughson's evidence of this mathematical model because it determined the study lacked a proper foundation, to wit, exclusion of one of the asbestos fibers, chrysotile, from the study. The court properly exercised its discretion. (Korsak v. Atlas Hotels, Inc., supra, 2

Cal.App.4th at p. 1523.) OCF neither provided an offer of proof at trial to explain how the model should be accepted regardless of the exclusion of chrysotile, nor did OCF provide any information or authority to convince us otherwise.

(3) Non-Occupational Exposure

OI contends the trial court erred in excluding evidence of environmental dust. We disagree.

Towards the end of Phase II, OI raised the issue of presenting a defense of environmental exposure to asbestos. The court noted that in Phase I the jury determined Rekdahl was injured as a result of exposure to asbestos containing products, and stated "I don't think that you can say that there is a bunch of stuff in the air." OI argued that a determination of what caused Rekdahl's illness did not exclude the existence of other asbestos dust in the environment, such as that created by brakes and brake linings. As an offer of proof, OI argued it would elicit testimony that "plaintiff's mesothelioma was caused by environmental exposure, to wit, products that were not in the shipyard, and that we could demonstrate or offer to prove to the jury that that was the legal cause to the exclusion of our products consistent with the instructions on burden of proof and so forth."

Based on this record, the trial court did not abuse its discretion in excluding evidence of environmental causes of asbestos because of defendant's insufficient offer of proof. It seems OI is again arguing it was confused by the trifurcation order and should be permitted to put on an environmental asbestos defense in

Phase II because nothing in the order suggested that a determination of what asbestos caused the disease was to have been decided in Phase I. In fact, OI conceded it presented no evidence on the culpability of background asbestos in Phase I. That decision was one made by OI and we will not interfere with trial strategy. While introduction of additional causes of Rekdahl's illness may have reduced the jury's determination of the percentage of OI's legal responsibility, evidentiary error, if any, was created and caused by OI. On appeal, OI merely relitigates the issue without presenting argument or authority to convince us otherwise.

(4) Government Contractor Defense

OCF and OI contend the court erred in precluding military specification evidence that would have established their immunity from liability under the government contractor defense.[6] We disagree.

The admissibility of such evidence in this asbestos litigation is governed by the United States Supreme Court standards in Boyle v. United Technologies Corp. (1988) 487 U.S. 500 and Los Angeles Superior Court General Order No. 37.27.[7]

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[6] OCF's argument is relegated to a footnote on page 72 of a 74-page opening brief.

[7] General Order No. 37.27 provides: "IT IS HEREBY ORDERED that the admissibility of evidence relating to government specifications shall be determined by the trial court. Liability for design defects in military equipment cannot be imposed pursuant to California

[Footnote continued on next page]

In Boyle, "[t]he father of a Marine pilot who had drowned when he was unable to open the escape hatch of his military helicopter underwater sued for the loss of his son. The Government had provided detailed military specifications in contracting for the purchase of the helicopter, specifications which extended to the design and operation of the hatch." (In re Hawaii Federal Asbestos Cases (9th Cir. 1992) 960 F.2d 806, 810.) In determining whether the helicopter manufacturer should be subject to a state-law tort action, "the Supreme Court outlined the contours of the military contractor defense. Under certain conditions, this defense, . . ., immunizes contractors who supply military equipment to the Government from the duties imposed by state tort law. Such displacement of ordinary tort liability 'occur[s] only where . . . a "significant conflict" exists between an identifiable "federal policy or interest and the [operation) of state law. . . ."' [Citations.] Thus, '[l]iability for design defects in military equipment cannot be imposed [on military contractors], pursuant to state law, when (l) the United States approved reasonably precise specifications; (2)

[Footnote continued from previous page]

law, subject to preconditions and exceptions, when (l) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. (See Vermeulen v. Superior Court (1988) 204 Cal.App.3d 1192; Boyle v. United States Technologies Corporation (1988) 487 U.S.___ [101 L.Ed.2d 442, 108 S.Ct. 2510].)"

the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.' [Citation.]" (Ibid.)

In In re Hawaii Federal Asbestos Cases, supra, the 9th Circuit examined the Boyle criteria in the context of asbestos cases and determined asbestos insulation was not "military equipment" as described in Boyle, and, therefore the defense could not be invoked. (Id. at p. 810.)[8] The court reasoned "the fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (Id. at p. 811.)

The 9th Circuit additionally reasoned even if the asbestos insulation was viewed as "military equipment", the manufacturers would still be precluded from invoking the defense because they conceded "the Navy in no way prohibited them from placing warning labels on their insulation products. They could have provided detailed and prominent statements regarding the dangers of asbestos insulation without violating the terms of their procurement contracts or their product specifications." (Id. at p. 812.)

We now apply the reasoning of Boyle and In re Hawaii Federal Asbestos Cases to the facts of our case.

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[8] OI was a defendant and an appellant in that action.

The record reflects the court conducted a non-transcribed hearing at which he heard the deposition testimony of a Mr. Shannon and then ruled that OCF and OI failed to present sufficient evidence of military specifications in order to assert the military contractor's defense. OCF and OI argued Mr. Shannon testified that Kaylo complied with military specifications and the military Kaylo was identical to commercial Kaylo. OCF and OI made an offer of proof that Kaylo met the military specifications regarding temperature, and nothing more.

Our review of the trial court's decision is hampered by a lack of record of the hearing at which Mr. Shannon's testimony was presented, and on which the court based its ruling. Additionally, Mr. Shannon's complete deposition transcript is not part of the appellate record, and the reading of summaries of testimony and selected pages into the trial transcript does not provide an adequate record for a proper review. A primary rule in appellate review is that an appealed (order or ruling) is presumed to be correct. "All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (Denham v. Superior Court (1970) 2 Cal.3d 557, 564; see also In re Marriage of Arceneaux (1990) 51 Cal.3d 1130, 1133.) The appellant has the burden to demonstrate error and to provide an adequate record for this court's review. (Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295; Ballard v. Uribe (1986) 41 Cal.3d 564, 574.)

Even without this portion of the record, defendants do not support their claim of error. They failed to provide argument or authority to refute the court's finding

of insufficient evidence of military specifications to support one of the Boyle criteria. Contrary to OCF and OI's assertions, the record before this court lacks any offer of proof as to the first or third criteria for the Boyle defense. The evidence produced at trial merely supports the view Kaylo was an off-the-shelf product that could be sold to military and non-military consumers. Under Boyle and In re Hawaii Federal Asbestos Cases, and the facts of our case, appellants failed to provide required evidence to establish liability based on the government contractor defense.

c. Testimony of Dr. James Robb

OCF contends it was unfairly surprised by Dr. James Robb's (Robb) testimony that he measured the microvillae in the electron microscope photographs of Rekdahl's pathology, because the pathologist did not testify to such measurements in his deposition. OCF further contends Robb's testimony was unreliable and the trial court erred by excluding an expert witness who would provide measurement testimony. All contentions are without merit.

In Phase I, Robb testified, in relevant part, his diagnosis of the malignant neoplasm on Rekdahl's lung as mesothelioma, rather than adenocarcinoma, was supported by his finding of characteristic long, thin microvilli in the cells of the tissues. Robb identified the mesothelioma cells with the long thin microvilli in the electron microscopy prints of Rekdahl's tissue slides prepared by defense expert Dr. Russell Sherwin (Sherwin).

On cross-examination by OCF's counsel, the following colloquoy occurred: "Q. In terms of measuring

microvilli, as I believe you did for Exhibits 19 and 20 (Sherwin's slides), did you measure these? [¶] A. I measured those, yes, with a ruler, not an electron micrometer. . . . [¶] Q. So it is your testimony that electron microscopists trained in the measurement of microvilli just have to take a ruler and measure the image contained on the photograph [¶] And that is an accurate scientific way of measuring microvilli? [¶] A. I did not say that. Electron microscopists have things called electron micrometers where they measure off the screen or the prints. [¶] For those of us who do not have access to that, we can take a ruler and measure the length on a blown up picture, and it is very accurate for the ratio. [¶] Q. When did you do this? [¶] A. It was after the deposition when these were presented to me. [¶] Q. Sometime after the deposition? [¶] A. After the deposition, the next day, when the prints were given to me. [¶] Q. The next day. Okay. . . ." Defense counsel then continued a lengthy cross-examination on the subject of measurement.

Subsequent to Robb's testimony, defense expert and pathologist Dr. Russell Sherwin testified electron-microscopy and microvilli analysis were too unreliable and controversial to be useful in distinguishing between mesothelioma and carcinomas. Additionally, Sherwin testified electronmicrograph was the scientific method used for measuring microvilli.

Prior to the completion of Sherwin's direct examination, OCF advised the trial court that after Robb's measurement testimony, and without informing Sherwin, OCF had Dr. Linda Kelly (Kelly) at UC Clinical Laboratories measure the microvilli in the

exhibits and prepare a report. OCF moved that Kelly be permitted to testify, or in the alternative, her report be given to Sherwin for evaluation and testimony. OCF argued while there were discovery problems inherent in the request for Kelly's testimony, defendant was surprised by Robb's testimony regarding "after the deposition" measurements, and the jury should be permitted to hear measurement testimony by someone who measured the microvilli with a scientifically appropriate micrometer. Rekdahl objected to the addition of the witness or admission of the report on the ground Kelly was an undisclosed witness and Robb had, in fact, testified to long microvilli characteristics and the diagnosis of mesothelioma at his deposition. OCF did not refute this argument. The court denied OCF's motion and stated: "Well, it seems to me that that [Robb's deposition testimony] is enough for you to have been in a position to have been on notice, and to get that evidence at that time, and I think this is too late a date. The court did not abuse its discretion in excluding Kelly's testimony and report. Aside from the fact she was an undesignated witness and her appearance at trial was in contravention of the court's December 20, 1991 discovery order,[9] there was

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[9] Judge Lewin's pretrial order regarding expert witnesses read, in relevant part: "Defendants are ordered to disclose by Monday, December 16, 1991, the actual trial experts which shall be used in the trial of Phase I of this action with the exception of defendants' joint-retained expert pathologist. [¶] The defendants shall disclose the identity of their joint-retained expert pathologist no later than Thursday, December 19, 1991. [¶] . . . Defendants' experts that are not timely disclosed or

[Footnote continued on next page]

information in Robb's deposition testimony to put OCF on notice that he would testify about the length of microvilli. Also, OCF elicited the measurement testimony on cross-examination. We presume this line of questioning was based on information from Robb's deposition. Furthermore, testimony regarding length of microvilli and the reliability of measurement techniques were presented the jury by both Robb and Sherwin. The jury chose to believe Robb.

d. Testimony of Dr. Cooley Butler

OCF contends the trial court erred in admitting the testimony of Dr. Cooley Butler (Butler), regarding the nature and causes of mesothelioma, because his designation on the expert witness list was in contravention of the court's "one retained expert per discipline" order. The contention is without merit.

On December 20, 1991, Judge Lewin issued a pretrial order regarding expert witnesses which read, in pertinent part, "IT IS HEREBY ORDERED that the trial experts in this case shall be limited to one retained expert per discipline per side." Rekdahl had designated, among others, Dr. James Robb, "a pathologist who may testify regarding plaintiff's medical condition and its cause, including, but not limited to, mesothelioma, asbestosis, and lung cancer", and Dr. Cooley Butler, "one of the plaintiff's treating physicians [who]

[Footnote continued from previous page]

produced for deposition pursuant to this order shall be excluded from testifying at trial."

may possibly testify as to the medical causation and the nature of the disease from which plaintiff suffers as well as the medical treatment provided to the plaintiff." Rekdahl had also designated certain portions of Butler's videotape trial testimony from December 17, 1991 to be admitted into evidence.

OCF filed and argued a motion in limine to preclude Rekdahl from calling two expert pathologists, Robb and Cooley, during Phase I of the trial because the "double designation" was in violation of Judge Lewin's pretrial order. OCF argued, contrary to Rekdahl's position that Butler was a treating physician, Butler never met or examined Rekdahl but only reviewed his pathology in the hospital, and was designated by Rekdahl as an expert. OCF did agree with the court, however, that Butler's analysis of Rekdahl's tissue was part of the plaintiff's treatment. In opposition, Rekdahl argued while Butler had been deposed and cross-examined by all sides, neither plaintiff nor defendants had retained his services. Butler was subpoenaed to appear at his deposition. Additionally, Rekdahl argued, Butler practiced medical care and treatment, as did the oncologist Dr. Brouillard (Brouillard) and the surgeon Dr. Young (Young), yet OCF did not object to the admission of their testimony. The court denied OCF's motion.

The jury viewed a videotape of Butler's deposition in which the physician testified he was an anatomical pathologist in the hospital where surgery was performed on Rekdahl. He examined portions of Rekdahl's surgical tissue samples. Butler further testified he was not retained by either party to do anything but describe his involvement in Rekdahl's

treatment. He never met Rekdahl, but prepared a portion of the surgical pathology report. Butler explained he observed malignant neoplasm in the pathology, characteristics typical of diffuse malignant mesothelioma, and made that diagnosis. Butler further testified asbestos exposure is a major precondition for the development of mesothelioma.

OCF again argues, without any supporting authority, the court should not have accepted Rekdahl's argument that Butler was not "retained" within the meaning of Judge Lewin's order, because plaintiff's counsel arranged for the deposition. OCF argues since the diagnosis of mesothelioma is made by pathologists, Butler's testimony would bolster Robb's testimony and present the jury a skewed picture of Rekdahl's medical condition. OCF only offers a conclusory argument that the court's ruling had a material effect on the defendant's opportunity to have a fair trial, but fails to explain the prejudicial error.

There is a distinction between retained experts and other experts. (Hurtado v. Western Medical Center (1990) 222 Cal.App.3d 1198, 1203.) "Because a percipient expert is not given information by the employing party, but acquires it from personal observation, the [discovery statutes treat] him or her as a fact witness." (Ibid.) The record reflects that Rekdahl properly listed Butler as a treating physician who would render his expert opinion on plaintiff's disease. Butler did the analysis and prepared the report the oncologist used as part of the course of treatment. In contrast, Robb, who was not involved with the initial review of the tissues, the diagnosis or Rekdahl's treatment, was hired or retained to subsequently analyze

pathology samples and provide testimony on his findings. The court did not abuse its discretion in permitting Butler's deposition testimony to be heard by the jury.

e. Testimony of Dr. Barry Castleman

OCF challenges Dr. Castleman's (Castleman) qualifications as an expert under Evid. Code, § 801 (erroneously referred to as § 702) and contends the trial court erred in failing to exclude his testimony regarding the timing and level of OCF's knowledge of health risks associated with asbestos exposure.[10] OCF argues Castleman is not a medical doctor and therefore unable to testify about medical issues. The challenge is without merit. This is not the first time either OCF or OI (or other asbestos manufacturers) has challenged Castleman's qualifications as an expert witness. Castleman is an environmental consultant with a Ph.D

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[10] Evidence Code section 801 provides: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

in Hygiene and Public Health whose trial testimony included facts and circumstances surrounding occupational exposure to asbestos and the health effects of that exposure. He has testified to the state of medical and scientific knowledge of asbestos-related diseases from the turn of the century to the present, as well as defendants' actual and constructive knowledge of such medical and scientific literature.

In our case, OCF filed a motion in limine to exclude Castleman as an expert witness on the basis he lacked medical training or experience, and therefore, had no independent knowledge, based on any scientific analytical ability or medical experience, to determine the significance or the substance of any particular article or study. OCF advised the court of cases in which Castleman's testimony was restricted or excluded.[11] Additionally, OCF argued, aside from Castleman's lack of qualifications, it would be pre-

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[11] Counsel advised this court of the following cases: Wilson v. Johns-Manville Sales Corp. (5th Cir. 1987) 810 F.2d 1358, cert den. (1987) 484 U.S. 828 (affirming district court's exclusion of Castleman's testimony as a sanction for failing to produce documents in response to a subpoena duces tecum); In re Related Asbestos Cases (N.D.Ca. 1982) 543 F.Supp. 1142 (Castleman's testimony inadmissible as that of an expert witness, but admissible as foundational witness on research methods and identification of existence of materials); Rutkowski v. Occidental Chemical Corp. 1989 WL 32030 (N.D.Ill.) (unpublished memorandum opinion in which the court granted defendant's motion in limine to bar Castleman from testifying as an expert witness).

judicial to permit an advocate of a particular viewpoint to review documents and give his own conclusions.

The court did not agree with OCF's argument that Castleman required a medical degree in order to testify about the literature, but agreed with the "advocacy" concern. Therefore, the court denied OCF's motion but restricted the scope of Castleman's testimony. The court ruled Castleman would be prohibited from testifying as to corporate documents. He would not be permitted to argue what the impact should have been on persons and companies who may have seen the documents. The court further ruled Castleman was qualified only as an historian and a state-of-the-art expert. As such, he would be permitted to comment, without restriction, on medical articles and their meaning. Castleman testified as to the development of knowledge concerning asbestos and the connection between asbestos and cancer. The significance of Castleman's testimony was that he was able to establish it was generally known by the 1930's within the asbestos industry that asbestos caused asbestosis and cancer, and that OCF had knowledge of these dangers.

In reviewing the challenge to Castleman's qualifications, we note the competency of an expert witness is left to the sound discretion of the trial court. Absent an abuse of discretion, the trial court's decision will not be reversed on appeal, unless the evidence shows a witness clearly lacked qualifications as an expert and the judge held the witness to be qualified as an expert witness. (Bernard Jefferson, 2 Cal. Evidence Benchbook (2d ed. 1982) § 29.2, p. 986.)

In our case, the record reflects Rekdahl provided a necessary foundation for Castleman's educational back-

ground and his credentials as an environmental author, consultant and medical historian. Additionally, Castleman had testified in asbestos related litigation matters in 110 trials. The court considered Castleman's special knowledge, skills, experience and education and determined, with some restrictions on his testimony, he was qualified to testify as an expert witness. The court determined Castleman's testimony would probably "assist the trier of fact" to understand the evidence. "A trial court enjoys broad discretion in ruling on foundational matters on which expert testimony is to be based." (Korsak v. Atlas Hotels, Inc., supra, 2 Cal.App.4th at p. 1523.)

OCF premised its appellate argument on Castleman's lack of a medical degree and relied on Rutkowski v. Occidental Chemical Corp., supra, an unpublished Illinois trial court memorandum opinion, to support its position. However, OCF failed to provide either competent authority or anything more than conclusory argument to explain how Castleman's testimony, already restricted by the court, created prejudicial error. In fact, OCF does not contest the accuracy of Castleman's testimony or the legitimacy of the articles he discussed.

In a footnote in its reply brief, OCF alternatively asserts, without any citations to the record, that if we were to conclude the court properly allowed Castleman to testify as to the existence of the medical articles, then the trial court abused its discretion by permitting Castleman to comment on the conclusions of these articles and to testify as to the general state of knowledge of the medical and scientific community regarding the hazards of asbestos. OCF cites no evidence for

this theory and has thus waived this claim. (Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal.App.4th 234, 263, fn 7; Biljac Associates v. First Interstate Bank (1990) 218 Cal.App.3d 1410, 1434.) This court "is not required to make an unassisted study of record in search of error." (Osborn v. Irwin Memorial Blood Bank, supra, 5 Cal.App.4th at p. 263 fn. 7.)

We additionally note that in contrast to Castleman's testimony, the defense presented Demopolous as its state-of-the-art witness to review and comment on the literature. The jury then had the opportunity to consider and weigh the evidence presented by each of the experts. On this record, we determine the court did not abuse its discretion in allowing Castleman to testify as an expert witness.

f. Testimony of John Thomas

OCF contends the trial court erred in permitting into evidence the deposition testimony of former OFC [sic] President John Thomas (Thomas) on the ground the witness was incompetent and the testimony unreliable. We disagree.

OCF filed a motion in limine requesting the trial court strike Thomas' deposition testimony because of witness incompetency pursuant to Evidence Code section 701.[12] The deposition had been taken in April,

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[12] Evidence Code section 701 provides: "(a) A person is disqualified to be a witness if he or she is: [¶] (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or [¶] (2)

[Footnote continued on next page]

1991, in connection with other litigation. OCF's argument that 83-year-old Thomas had multiple medical problems, was supported by declarations of his personal physician who attested to Thomas' "'episodes of forgetfulness and confusion,'" and the untrustworthy nature of his deposition testimony, and another physician who examined Thomas and had "[the] impression . . . that he has an element of dementia which has affected his cognitive function." OCF noted rulings in other courts striking Thomas' deposition. A copy of Thomas' deposition was attached to the motion.

At a hearing, OCF reiterated the opposition to Thomas' deposition. In opposition, Rekdahl argued that two OCF attorneys had been present at Thomas' deposition and they did not express concern with the responses to their questions. Thomas is competent, Rekdahl argued, but whether he was lucid in the deposition was an issue to be decided by the jury. The court agreed to read the deposition before ruling.

The court denied OCF's motion and stated: "I don't think competency is necessarily a jury question. (¶) I think it is a question of weight for the jury, but I don't think that the defendants have . . . carried the burden of proof to prove that he is incompetent, . . . [¶] I

[Footnote continued from previous page]

> Incapable of understanding the duty of a witness to tell the truth. [¶] (b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness."

don't think he is the most coherent witness I have ever heard, but on the other hand I think every effort was made to stifle his testimony."

"As a general rule, every person is qualified to be a witness, regardless of age. [Citations.] One is disqualified as a witness in two circumstances--if he or she is incapable of expressing himself or herself concerning the matter so as to be understood; or if he or she is incapable of understanding the witness's duty to tell the truth. [Citation.) The party challenging a witness's qualification has the burden of proving disqualification. [Citations.] Once the trial court determines the competency of a witness, this decision will not be disturbed on appeal in the absence of a clear abuse of discretion. [Citation.]" (Adamson v. Department of Social Services (1988) 207 Cal.App.3d 14, 20.)

We have read Thomas's deposition transcript and agree with Judge Barrett's ruling. While Thomas did not recall every date and detail of his tenure as President of OCF, from 1967-1971, he was clearly able to testify about OCF's knowledge of the hazards of Kaylo. OCF failed to meet its burden of either proving Thomas incompetent or that the court abused its discretion in admitting this evidence. Additionally, OCF failed to explain, except in general conclusory terms, how introduction of Thomas's testimony, or what portion of this allegedly improperly included testimony, created prejudicial error. Again, OCF relied on unpublished and incompetent authority to support its position.

2. OCF and OI's Rights to Have Liability Properly Apportioned Under Proposition 51 Were Not Abrogated.

a. Introduction

"In 1986, the voters adopted Proposition 51, an initiative measure designed to modify the doctrine of joint and several liability in tort cases. Among other things, Proposition 51 added section 1431.2 to the Civil Code. Section 1431.2 provides that in an action for wrongful death, personal injury, or property damage, each defendant's liability for the plaintiff's 'non-economic' damages shall be several only, not joint, and that each defendant shall be liable only for the percentage on 'non-economic' damages which corresponds to that defendant's proportionate share of fault." (DaFonte v. Up-Right Inc. (1992) 2 Cal.4th 593, 596, fn. omitted.)

The basis of defendants' Proposition 51 argument is that through a series of the trial court's evidentiary rulings and instructional errors, the jury was precluded from properly apportioning liability to all legal causes, whether named defendants or unnamed entities, for Rekdahl's noneconomic damages. We disagree.

b. Exclusion of Evidence

(1) Johns-Manville Market Share

OI contends the trial court misapplied Los Angeles Superior Court General Order 37.04 and precluded evidence of Johns-Manville's (JM) market share contribution of asbestos-containing products at the Shipyard.

OI further contends Proposition 51 mandates the admission of market share evidence despite the provisions of General Order 37.04. The contentions are without merit.

The admissibility of market share evidence is governed by the 1989 Los Angeles Superior Court General Order No. 37.04 which states: "IT IS HEREBY ORDERED that the market share theory of liability established by Sindell v. Abbott Laboratories (1980) 26 Cal.3d 588 is inapplicable to actions involving exposure to asbestos-containing products. (See Mullen v. Armstrong World Industries Inc. (1988) 200 Cal.App.3d 250.)"

In Sindell v. Abott Laboratories, supra, "our Supreme Court adopted a theory of liability for use where 'fungible goods' which cause harm to consumers 'cannot be traced to any specific producer.' [Citation.] The product in question was the drug diethylstilbesterol (DES) which was marketed as a miscarriage preventative but which caused cancerous conditions many years later in the offspring of the pregnant women who took it. All the DES which was sold was manufactured to an identical formula. [Citation.] Because of the circumstances of the drug's use and the lapse of time, plaintiff Sindell was unable to identify the maker or makers of the drug which caused her injury. [Citation.] From Sindell came a new theory of market share liability only available against the makers of a 'fungible' product 'which cannot be traced to a specific producer' and only applicable if plaintiff joins a 'substantial share' of the makers of the product." (Wheeler v. Raybestos-Manhattan (1992) 8 Cal.App.4th 1152, 1155.)

Under the Sindell theory of market share liability, "'"[p]laintiffs . . . proceed with their case against those members of the industry that are named as defendants. This theory shifts the burden of proof to each manufacturer to prove its innocence . . . . [¶] If, after proceeding against the industry in this manner, plaintiff successfully establishes liability, damages are simply apportioned among defendants on the basis of each defendant's share of the product market. The resultant market share liability imposed thus 'approximate[s each manufacturer's] responsibility for the injuries caused by its own products.' A defendant can avoid liability only by proving that it did not produce the specific product that harmed the plaintiff."' [Citations.]" (Mullen v. Armstrong World Industries, Inc. (1988) 200 Cal.App.3d 250, 255 fn. 6.)

In Mullen v. Armstrong World Industries, Inc., supra, a case involving the use of asbestos containing products in home construction, the court declined to extend the Sindell theory of liability to the field of asbestos-related injuries because the products containing the multi-faceted mineral could not meet the "fungibility" prerequisite. (Id. at pp. 256-266.) The court reasoned: "[M]arket share liability was formulated in the singular situation of Sindell where the injured parties attacked 'a product which carried with it a singular risk factor.' [Citations.] By contrast, plaintiffs here seek recovery for damage to their persons and property. Because 'asbestos is not a "product," but rather a generic name for a family of minerals' [citation] employed in a myriad of uses, the unavoidable conclusion is that plaintiffs are attacking an entire industry, not seeking recovery for damages caused by

a single fungible product 'carr[y]ing with it a singular risk factor.'" (Id. at p. 257.)

In our case, Rekdahl's product identification witness Paul Reed (Reed), testified he worked with Rekdahl in the Shipyard apprentice program doing pipe covering and insulation work. Reed and Rekdahl put insulation on pipes in the compartments and engineering spaces of ships that came into the yard for repair. From 1951-1955, he and Rekdahl, on various occasions, were physically present in the same ship compartment while performing insulation duties. Reed further testified from 1951-1959 Kaylo was used almost exclusively in the pipe insulation trade at the shipyard. He identified OI and OCF Kaylo. While other asbestos containing products were used, including those by Fibreboard, Eagle Pitcher, Thorpe and Carey, the two most prominent brands of insulation used were Kaylo and JM. Reed was unable to tell what the overall percentage of the JM product was used.

Defense expert economist Dr. Lewis Solmon (Solmon) testified he calculated the market share for OI containing products or pipe and block insulation during the years Rekdahl worked at various shipyards (1951-1975), and concluded OI had 3.2 percent of the market, or 1/4 of 1 percent of the total market of asbestos products. The calculations were made by reviewing OI's sales records. Solmon further testified he did not verify the figures in the records which he considered as actual sales made by the company. He did not know where OI sold its product nor did he have the total figures of the amount of Kaylo sold to the Shipyard from 1951-1958. Solomon further testified to

OI's sales figures and figures for OI Kaylo sold and sold under names of other companies.

When Solmon offered opinion testimony regarding a generic market share and its relation to JM, Rekdahl objected on grounds it was in contravention of General Order 37.04 and based on documentation obtained in discovery in another case. OI then made an offer of proof that Solmon was prepared to testify, based on his study, that JM supplied more that 50 percent of asbestos containing products at the Long Beach Shipyard. OI argued the percentage was relevant because Rekdahl's product identification witness, Reed, failed to recall JM's significant contributions and that the total amount of JM product at the Shipyard was a factor of causation. OI further argued that under Proposition 51, defendants had the right, in regard to noneconomic damages, to prove others were responsible for Rekdahl's injuries, and the percentage of that responsibility. The court excluded the JM evidence, but permitted both OI and OCF to present, as a matter of defense, evidence of each of their own market shares.

The purpose of OI's argument was to transfer liability and allocate the largest percentage of fault to JM, a non-party whose products were identified by witnesses. To do this, OI, again without supporting authority or anything more than conclusory argument, attacked General Order 37.04 by stating nothing more than "it excludes the introduction of relevant evidence." That is not enough.

Contrary to OI's assertion, neither the trial court's ruling nor General Order No. 37.04 prevented the introduction of relevant market share evidence. Defendants' best defense to product identification was to

present evidence establishing their own low market share percentage. The jury would consider this evidence in determining allocation of fault. OCF and OI were permitted to introduce calculations. Evidence of JM's "prominent" presence at the Shipyard was also put into evidence. However, the jury heard Solmon explain he computed OI's 3.2 percent market share for the years 1959-1975, though OI maintained it produced no asbestos containing products after 1958. The calculations seemingly included non-producing years and created, what the jury may have reasoned, an artificially low percentage. Even if Solmon had been permitted to testify regarding JM's market share, this evidence would not comport with the parties' agreement that responsibility for Rekdahl's injuries be apportioned among manufacturers whose products were identified in Rekdahl's breathing zone. JM's insulation products were not identified in Rekdahl's breathing zone. If they were, perhaps the jury would have apportioned a larger allocation of fault to that entity.

(a) Supplier/Distributor

In a related market-share contention, OI argues it attempted to offer evidence JM was the supplier of its component asbestos, and OCF was the distributor of OI's Kaylo from 1953-1958. OI was precluded from either introducing such evidence or instructing the jury on the liability of both the component manufacturer

and the distributor of its product.[13] Furthermore, OI contends the jury should have been allowed to allocate a percentage of fault to the supplier and the distributor.[14] Instead, OI argues, it was forced to bear responsibility legally attributable to other entities. We disagree.

The basis of OI's argument is that if the asbestos-containing products that OI sold were defective, such defect is directly attributable to the asbestos used in those products. Since JM was a major supplier of

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[13] At trial, Castleman testified that OI neither mined nor milled asbestos. When asked if OI got all of its asbestos from JM, Rekdahl interposed an objection claiming the issue regarding OI's purchase of asbestos was irrelevant to the issue of how much product was sold. OI argued evidence as to the manufacturer of a component part is relevant to allocation of liability, to wit, Proposition 51. OI conceded while such testimony was not conclusive, it was relevant to the total mix of asbestos containing products that were identified. The court sustained the objection stating "the fact that you bought your material from somebody is just like if you got it from a miner."

[14] At the conclusion of Phase 2 when the court and counsel reviewed the special verdict form, OI again argued that JM manufactured a component part and the jury should consider its liability. The court agreed with Rekdahl and determined that the mined raw asbestos fibers in and of themselves are not defective, but become defective when they are released in the air. The court noted OI then put the asbestos in a product it knew would be used by insulators. The court then ruled it would not permit the jury to consider the liability of the manufacturers of asbestos, i.e. JM (though JM was listed on the special verdict form), but the jury could consider, under Proposition 51, the liability of the manufacturers of the products shown to be within Rekdahl's breathing space.

asbestos used in OI's products, JM bears responsibility. However, OI's argument is based on a faulty premise. Asbestos is a fiberous mineral. In its natural state, it is neither dangerous nor harmful. Its toxicity and ability to cause harm is related to how and to which type of fibers are incorporated into a product, the physical properties of the product, and the percentage of asbestos in the product. (Mullen v. Armstrong World Industries, Inc., supra, 200 Cal.3d at p. 256) "'A product's toxicity is also related to whether the product is in the form of a solid block or a loosely packed insulating blanket and to the amount of dust a product generates. The product's form determines the ability of the asbestos fibers to become airborne and, hence, to be inhaled or ingested. The greater the product's susceptibility to produce airborne fibers, the greater the product's potential to produce disease.'" (Ibid.) The presence of the asbestos in Kaylo is not what made the jury determine that the product was defective. Kaylo was rendered defective because of OI's failure to warn users of the product's dangerous propensities. Therefore, OI's reliance on Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal.App.3d 621, 629 holding a component part manufacturer "liable for damages caused by a component part which was defective at the time it left the component part manufacturer's factory," is inapplicable.

This case was tried on, among others, a strict liability theory based on failure to warn. "A manufacturer, distributor or wholesale or retail dealer is strictly liable in tort when an article he or she places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a

human being. [Citations.] [¶] The strict liability concept of defectiveness applies to products which are dangerous because they lack adequate warnings or instructions. [Citation.] '[A] manufacturer or a supplier of a product is required to give warnings of any dangerous propensities in the product, or in its use, of which he knows, or should know, and which the user of the product would not ordinarily discover.' [Citation.] Even though the product is flawlessly designed and manufactured, it may be found defective within the general strict liability rule and its manufacturer or supplier held strictly liable because of the failure to provide an adequate warning. [Citations.] [¶] Strict liability generally focuses on the product to determine whether it is defective rather than on the actions of its manufacturer. This concept is readily applied in design or manufacturing cases where the defect is inherent in the product. However, in failure to warn cases where the product is both flawlessly designed and manufactured, the defect is not inherent in the product; rather, the product is rendered defective because of the actions of the manufacturer in failing to adequately warn of the dangerous propensities of its product." (Persons v. Salomon North America, Inc. (1990) 217 Cal.App.3d 168, 174-175, emphasis added.)

In Lee v. Electric Motor Division (1985) 169 Cal.App.3d 375, plaintiff lost her hand while using a meat grinder and filed an action against the component part manufacturer who manufactured and supplied the motor installed in the grinder. (Id. at p. 381) In addition to considering the issue of whether the component part was itself defectively designed, the court looked at

a defect caused by a failure to warn and the liability of the maker of a component part. (Id. at p. 387.) The court considered defendant's role in the manufacturer of the grinder and stated: "Moreover, we stress that defendant gave no input and had no control over the design, manufacture, and packaging of the finished product. The cases relied on by defendant demonstrate a reluctance against imposing liability for the component-part manufacturer's failure to warn the consumer where the final product is subsequently packaged, labeled and marketed by another manufacturer. [Citations.)" (Id. at p. 389.)

The Lee court also considered the case of Walker v. Stauffer Chemical Corp. (1971) 19 Cal.App.3d 669 in which "plaintiff was injured by 'Clear-All,' a drain cleaning product containing sulfuric acid. The plaintiff sued Stauffer, the component-part manufacturer of sulfuric acid, in strict liability for failure to warn. Stauffer successfully moved for summary judgment, and the appellate court affirmed. Walker stated that it is not 'realistically feasible or necessary to the protection of the public to require the manufacturer and supplier of a standard chemical ingredient such as bulk sulfuric acid, not having control over the subsequent compounding, packaging or marketing of an item eventually causing injury to the ultimate consumer, to bear the responsibility for that injury. The manufacturer (seller) of the product causing the injury is so situated as to afford the necessary protection.' [Citation.]" (Lee v. Electric Motor Division, supra, 169 Cal.App.3d at p. 389.)

The Lee court agreed with Walker "that the manufacturer of the finished product is in the best position

to protect against and warn of the danger that arises after the nondefective component part is installed in the finished product. And, as noted in Walker: 'We are referred to no California case, nor has any independent research revealed any such, extending the strict liability of the manufacturer (seller) to the supplier of a substance to be used in compounding or formulating the product which eventually causes injury to an ultimate consumer. On the contrary this dearth of authority indicates to us a reluctance on the part of the bench and bar to consider such an extension necessary or desirable for the protection of the ultimate consumer.' [Citation.]" (Lee v. Electric Motor Division, supra, 169 Cal.App.3d at p. 389.)

Under Lee and Walker, we determine the trial court correctly ruled and did not abuse its discretion in precluding OI from producing evidence and providing instructions on the liability of a component manufacturer and the distributor of its product.

(2) Product Identification

OI and OCF contend the court erred in excluding the deposition testimony of Charles Scherer (Scherer). Again, defendants fail to provide any argument or legal authority to support their position. The contention is without merit.

Scherer was a pipefitter at the Shipyard from approximately 1951-1956. He was in the same apprentice program as witness Reed. Reed had previously identified products that were in the same areas of the ships in which he and Rekdahl worked. Rekdahl had designated Scherer as a products identification wit-

ness, but withdrew his name at the commencement of Phase II. Defendants then requested they either be permitted to read into the record testimony from a deposition Scherer gave in 1984 in Thomas Logan v. Johns-Manville Corporation, et al., Los Angeles Superior Court Case No. SOC 53527, an unrelated case not designated in this action, or take Scherer's deposition. In Logan, Scherer had testified he worked in the same ship compartment with the plaintiff. Defendants argued Scherer's testimony was important for liability allocation purposes because he would say the Kaylo product comprised only 20-25 percent of the pipe covering used at the Shipyard. The court denied defendants' request to read Scherer's 1984 testimony into the record on the ground they were too late in designating the deposition. The court further ruled it had "no thought one way or another if you want to take [Scherer's] deposition," however "I don't think it is going to be used in this trial." Defendants took Scherer's deposition.

Towards the conclusion of Phase II, defendants again argued the admissibility of Scherer's recent deposition testimony on grounds of circumstantial evidence. Defendants argued Scherer was a pipefitter with Reed and did the same type of work insulating pipes. Defendants also made an offer of proof that George Roy, for whom Scherer worked as an apprentice, would testify during the years in question, he was in Rekdahl's breathing zone and believed Scherer was also in the area. In opposition, Rekdahl argued against the admissibility of the Scherer deposition, because the testimony failed to place Scherer in Rekdahl's breathing zone. The court ruled the deposition testimony inad-

missible because "there is no testimony on the part of the deponent that he was present in the breathing area of the plaintiff."

The record reflects the parties agreed the only relevant evidence of product identification and product exposure was that evidence which placed a specific product in Rekdahl's breathing zone. The jury was instructed, without objection, on this issue of legal causation.[15] The court properly excluded Scherer's deposition. In so ruling, the evidentiary issue the court considered was whether Scherer's testimony would have put the asbestos products he worked with in Rekdahl's breathing zone, not, as defendants would want us to say, whether Scherer's testimony, in connection with other evidence, would have created a reasonable inference that the products he used were in Rekdahl's breathing space. The court did not abuse its discretion.

(3) Rekdahl's Rip-Out Testimony

OCF contends the court prejudiced defendant's Proposition 51 defense by erroneously excluding Rekdahl's "rip-out" testimony. Again, OCF fails to

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[15] The jury was instructed with BAJI No. 3.76 (modified) which read: "With respect to asbestos-containing products, for legal cause it must be demonstrated that Mr. Rekdahl was in the breathing zone of, and inhaled respirable asbestos fibers from, a particular defendant's or manufacturer's product. [¶] A legal cause of injury or harm is a cause which is a substantial factor in bringing about the injury or harm."

provide legal argument or authority to support its position. The contention is without merit.

The admissibility of such evidence is governed by Los Angeles Superior Court General Order No. 37.15 which prohibits rip-out or cleanup testimony without prior identification of the products to which a plaintiff was exposed during this procedure.[16]

The court sustained Rekdahl's objection to admission of portions of his deposition testimony regarding "rip-out" procedures under General Order 37.15 because there was a lack of product identification. While acknowledging the products' identification requirement with General Order 37.15, OCF now contends there was sufficient circumstantial evidence to satisfy that requirement because Scherer's deposition testimony would have included identification of specific insulation products being "ripped-out" from around the pipes. This testimony, OCF argues, would have provided sufficient circumstantial evidence to satisfy the General Order 37.15 identification requirement. However, for reasons previously stated, we determined the

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[16] General Order 37.15 states: "IT IS HEREBY ORDERED that all counsel and witnesses shall abstain from any reference, comment or evidence, either by way of documents or testimony, as to rip-out or cleanup procedures until the trial court determines, pursuant to a hearing . . . , that the proffered evidence is sufficient to establish the identity of the asbestos-containing products to which plaintiff was exposed during said rip-out or cleanup procedures. General Orders No. 37.04 (inapplicability of Sindell) and No. 29 (exclusion of undesignated product identification witnesses) shall be considered by the trial court when said hearing is conducted. . . ."

court properly excluded Scherer's deposition testimony. Accordingly, OCF's argument for admission of Rekdahl's "rip-out" testimony must fail.

(4) Status of JM and Fibreboard

OCF contends, without argument or citation to authority, that under Proposition 51 the jury should have been given a more accurate picture of the market-share situation of the products at the Shipyard by being informed that JM and Fibreboard were parties in the action. The contention is without merit.

The trial court denied OCF's request JM and Fibreboard be added to the caption of the case on the special verdict form. OCF had argued these entities appeared on the caption of Rekdahl's pleadings filed in federal court in opposition to defendants' attempt to remove the action to the federal court. However, the record on appeal does not include copies of those pleadings, and issues regarding the attempted removal, which are not before this court, will not be considered.

As previously discussed, the trial court properly excluded evidence of JM's market share contribution pursuant to General Order No. 37.04. This ruling would be applicable in any attempt to present evidence of Fibreboard's market share contribution. The trial court did permit evidence that Rekdahl was exposed to JM and Fibreboard products, the special verdict form included a space to allow jurors to assess a percentage of responsibility to those companies against whom there was any evidence, and they did. The trial court did not err.

c. Special Verdict Form

OCF and OI contend the trial court erred and violated Proposition 51 when it provided jurors a special verdict form that only included identified third parties, refused to allow an "all other" category, and required the jury to find those identified on the form totaled 100 percent of the liability.[17] OCF and OI further contend this error shifted responsibility to defendants for injuries caused by the products of unidentified manufacturers. We disagree.

The gravamen of defendants' argument is that under Proposition 51, damages for plaintiff's non-economic damages must be apportioned among a "universe of tortfeasors" that included named defendants, non-

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[17] The Special Verdict Form provided, in relevant part:

"QUESTION NO. 5: Assuming that 100% represents the total legal causes of plaintiff's injury, what percentage of this 100% is attributable to each of the following? A cause may be 0%, but the total must add up to 100%.

	Percentage
Eagle-Picher	_____
Fibreboard/Pabco	_____
Johns-Manville	_____
Owens-Corning Fiberglas	_____
Owens-Illinois	_____
Philip Carey	_____
Pittsburgh-Corning/Unibestos	_____
U.S. Navy	_____
TOTAL	_____

joined entities, and unidentified entities. OCF and OI rely on DaFonte v. Up-Right Inc. (1992) 2 Cal.4th 593, Roslan v. Permea, Inc. (1993) 17 Cal.App.4th 110, and the Use Note for BAJI No. 1600 to support their position. However, these authorities do not stand for the proposition that a jury should be instructed to apportion fault among an entire world of unidentified and speculative tortfeasors against whom there is no proof of culpability.

DaFonte v. Up-right, Inc., supra, 2 Cal.4th 593, involved a third party suit by an injured worker. Plaintiff DaFonte, an employee of Van Erickson Ranches, was injured when his arm was drawn into the moving conveyor belt of a mechanical harvester he was attempting to clean. (Id. at p. 596.) Van Erickson Ranches paid DaFonte his workers' compensation benefits, and DaFonte filed an action against the harvester's manufacturer, Up-Right, Inc. (Ibid.) In a special verdict, the jury allocated fault among DaFonte, Van Erickson Ranches and Up-Right, Inc. (Ibid.) DaFonte and Up-Right, Inc. appealed from the judgments. (Id at p. 597.) Our Supreme Court granted review limited to the issue of joint and several liability under Civil Code § 1431.2, which focused on damages attributable to a non-defendant employer. (Ibid.)

The court found that "[t]he express purpose of Proposition 51 was to eliminate the perceived unfairness of imposing 'all the damage' on defendants who were 'found to share [only] a fraction of the fault.' [Citation.] In this context, the only reasonable construction of section 1431.2 is that a 'defendant['s]' liability for noneconomic damages cannot exceed his or

her proportionate share of fault as compared with all fault responsible for the plaintiff's injuries, not merely that of 'defendant[s]' present in the lawsuit. (Cf., Evangelatos v. [Superior Court (1988)] 44 Cal.3d [1118,] 1242, fn. 4, conc. & dis. opn. of Kaufman, J. [damages must be apportioned among '"universe" of tortfeasors' including 'nonjoined defendants'].)" (DaFonte v. Up-Right, Inc., supra, 2 Cal.4th at p. 603.) Therefore, under Proposition 51, the "universe of tortfeasors" was to include parties known to be responsible for plaintiff's injuries, whether or not named as defendants.

Roslan v. Permea, Inc., supra, 17 Cal.App.4th 110 involved a personal injury action and the allocation of comparative fault of settling defendants. A jury awarded plaintiff Roslan an award against Permea, Inc. and its subsidiary Zeks Air Dryer Corporation (collectively referred to as Zeks). (Id. at p. 111.) Two other defendants, Allied Container (Allied) and Benz Engineering (Benz) settled before trial. (Id. at p. 112.) At trial, the court refused to allow Zeks to introduce evidence as to the culpability of Allied. (Ibid.) The appellate court determined that under Proposition 51, without this additional information, the jury could not have properly assessed "the amount of comparative fault of either of the settling defendants," and reduce the noneconomic damage award by the appropriate amount. (Ibid.)

In deciding to remand for recalculation of the noneconomic damage award, the court looked at our Supreme Court's analysis of Civil Code section 1431.2 in DaFonte v. Up-Right, Inc., supra, where it was determined that "'the only reasonable construction of

section 1431.2 is that a "defendant['s]" liability for noneconomic damages cannot exceed his or her proportionate share of fault as compared with all fault responsible for the plaintiff's injuries, not merely that of "defendant[s]" present in the lawsuit.' [Citation.)" (Roslan v. Permea, Inc., supra, 17 Cal.App.4th at p. 113.) The court noted that "[t]he Defonte court cited Justice Kaufman's separate opinion in Evangelatos v. Superior Court (1988) 44 Cal.3d 1188 . . . for the proposition that damages must be apportioned among the '"universe" of tortfeasors,' including nonjoined defendants. [Citation.)" (Ibid.) The court then reasoned: "In the present case, liability was not apportioned among the 'universe of tortfeasors,' which included Allied and Benz Engineering. The trial court went even further, however, and refused to permit Zeks to present evidence of Allied's alleged culpability. Thus, the settling defendants were not included in the special verdict form, and the jury had no evidence from which to assess their comparative fault." (Ibid.) Therefore, under Proposition 51, the "universe of tortfeasors" was to include settling defendants who were considered responsible for plaintiff's injuries.

BAJI No. 16.00, used in our case, is a special verdict form "which contemplate[s] allocation of fault among defendants not present at trial." (Roslan v. Permea, Inc., supra, 17 Cal.App.4th at p. 113, fn. 13.) The relevant portion of the verdict form reads:

"QUESTION No. 6: Assuming that 100% represents the total negligence [and fault] [and wrongful conduct] which was the cause of plaintiff's [injury] [damage], what percentage of this 100% is due to the contributory

negligence of the plaintiff and what percentage of this 100% is due to the [negligence) [and] [fault] [and] [wrongful conduct] of the defendant[s] [and all other persons]?

"Answer: To plaintiff_____ _____%
[To plaintiff_____ _____%]
To defendant_____ _____%
[To defendant_____ _____%]
[Other person_____ _____%]
(Identify)
[Other person_____ _____%]
(Identify)
TOTAL_____% . . ."

(BAJI (8th ed.) p. 387, emphasis added.) The Use Note states, in part: "This verdict form . . . is designed to enable the court to include the entire universe of actors in the jury's determination of percentages of fault. [¶] If the name of the 'other person' is not known, a description, i.e., 'driver of car that did not stop' may be used." (Id. at p. 388.) The Use Note clearly refers to a universe of identified actors or tortfeasors.

Therefore, for the purposes of Proposition 51, we define the "universe of tortfeasors" as including those identified persons or entities, whether or not named as defendants, for which there has been shown evidence of culpability or responsibility for plaintiff's injuries. The use of an "all others" category that would include alleged unidentified tortfeasors, would only invite a jury to return a judgment based on speculation and second-guessing. That is not the intent of Proposition 51.

The record reflects the court and counsel agreed if there was a product within Rekdahl's breathing space, defendants were entitled to use Proposition 51. The court agreed if defendants could even identify a "phantom" product, the product could be listed on the verdict form. However, there was no evidence of any "phantom" product, to wit, a product perhaps described as packaged in a green and yellow box, in an area in which Rekdahl worked. The special verdict form included the names of identified parties and products with some degree of culpability for Rekdahl's injuries. Defendants had argued Rekdahl was exposed to other types of asbestos-containing products, including pads, gaskets, asbestos cloth, and asbestos cement. Rekdahl had testified he removed pads, but did not see cuts or tears, and also removed hardened gaskets and mud-type insulation from flanges on steam pipes. However, defendants failed to demonstrate these activities generated significant amounts of dust or respirable fibers to which Rekdahl was significantly exposed. Defendants had the burden to establish Rekdahl was sufficiently exposed to these products, that they contained asbestos, and they were a legal cause of his injuries. There was nothing to prevent defendants from presenting lay or expert witnesses to establish causation and allocation of liability. Defendants failed to meet their burden by merely presenting, without more, the names of other products and their possible presence at the shipyard. (See Sparks v. Owens-Illinois Inc. (1995) 32 Cal.App.4th 461, 478-479; Dumin v. Owens-Corning Fiberglas Corp. (1994) 28 Cal.App.4th 650, 656.)

Pursuant to legal authority and the evidence at trial, the trial court did not err in excluding the speculative "all other" category from the verdict form.

d. Burden-Shifting Instruction

OCF contends the trial court erred in providing the jury a burden-shifting instruction that improperly required defendants to prove the relative percentage of fault of other manufacturers or entities responsible for Rekdahl's injuries. We disagree. Although OCF presents neither argument nor legal authority to support its position, we briefly address this issue because of its relevance to defendants' over-all Proposition 51 argument.

At Rekdahl's request, the trial court instructed the jury with a modified version of BAJI No. 2.60, pursuant to General Order No. 37.24.[18] Under this order, a plaintiff in an asbestos case is entitled to a burden-shifting instruction if he or she had joined all known suppliers of the asbestos-containing product to which he or she has been exposed, except for suppliers who settled or were subject to a bankruptcy stay order. If

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[18] Modified BAJI No. 2.60 provides, in relevant part: "Each defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish: [¶] 1. That the negligent conduct of the United States Navy or the defective products of manufacturers other than Owens-Illinois and/or Owens-Corning Fiberglas were a legal cause of plaintiffs' injuries or harm; and [¶] 2. The share or percentage of responsibility for plaintiffs' injuries or harm caused by the negligent conduct of the United States Navy or the defective products of other manufacturers."

this condition is met, the court must give the following instruction, which states in relevant part: ". . . [¶] If the plaintiff establishes by a preponderance of the evidence (a) that plaintiff . . . was exposed to an asbestos-containing product of a particular defendant and (b) that plaintiff's . . . exposure to asbestos was a legal cause of the injury, then the burden of proof shifts to each said particular defendant to prove by a preponderance of the evidence [that its product was not a legal cause of the injury or damages] [or the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault]."

OCF argues this instruction created the presumption Kaylo was 100 percent responsible for Rekdahl's injuries. This presumption could only be rebutted if OI and OCF proved the precise fault of other entities. This would reduce their share of responsibility, but not disprove their own fault. OCF further argues the instruction is contrary to the law in Summers v. Tice (1948) 33 Cal.2d 80 and, a variation of Summers applied in Sindell v. Abbott Laboratories, supra, 26 Cal.3d 588, unless all "potentially responsible" entities are before the court.

OCF's argument is seemingly based on the mistaken premise BAJI No. 2.60 represents a "pure" application of the Summers/Sindell burden shift doctrine, but that is not so. First, as previously discussed, under General Order 37.04, the Sindell burden is inapplicable in asbestos cases. Second, General Order 37.24 addresses the problems in asbestos cases. Third, and most important, in a usual Summers-type case, more than one defendant acts negligently, but only one of the

defendants causes harm to the plaintiff. If the plaintiff is unable to prove which defendant caused the harm, equitable considerations shift the burden to the defendants to prove they did not cause the injury.

However, asbestos cases are matters of concurrent rather than individual causation because the injuries to plaintiff were caused by exposure to a number of defendants' asbestos-containing products at different doses over various periods of time. Most likely none of the defendants is wholly innocent, but rather all of the defendants share some responsibility for plaintiff's illness.

We additionally note under General Order 37.24, the court will give the burden-shifting instruction only where "all the known manufacturers, sellers and suppliers of asbestos-containing products to which plaintiff . . . was exposed, who can be joined (i.e., excluding those who are bankrupt or who have settled), are before the court[.]" In our case, as previously discussed, the "universe of identified tortfeasors," joined as defendants or identified by their product, was properly presented to the jury, and we will not reargue that issue. Therefore, Rekdahl should not be precluded from shifting the burden of causation to the defendants to establish the percentage of fault of the other identified tortfeasors, and OCF has not convinced us otherwise.

e. Setoff for Pretrial Settlements

OI contends, and Rekdahl agrees, that defendants are entitled to setoffs against the judgment for pretrial settlements. The amount of the setoffs, however, is in dispute. The trial court never ruled on this issue due to lack of information regarding the final terms and

amounts of the settlements between Rekdahl and Fiberboard and Pittsburgh, and retained jurisdiction to decide the matter. Accordingly, any consideration of setoffs and possible amendment of the judgment must occur in the trial court.

As previously discussed, at the conclusion of Phase I the jury returned a special verdict awarding Rekdahl $964,219 in economic damages and $2,500,000 in noneconomic damages. Sara Rekdahl was awarded $1 million in damages for her loss of consortium claim. At the conclusion of Phase III, the jury imposed punitive damages in the sum of $4 million against each defendant. After judgment was entered, defendants filed post-trial motions, including a motion to vacate and alter the judgment requesting setoffs for Rekdahl's pretrial settlements with Fibreboard and Pittsburgh-Corning, and, potentially, monies Rekdahl may receive from the JM Trust. The court took the post-trial motions under submission and ruled only on defendants' motions for JNOV and a new trial. The court then ordered Pittsburgh-Corning and Fibreboard to provide information regarding the terms of their settlements with Rekdahl. We cannot ascertain from the record whether the trial court received this information and/or conducted any hearings to determine the good faith of these settlements. The court did conduct a hearing on defendants' motions to vacate and alter the judgment, but did not rule on the motions and retained jurisdiction to further consider the matter. Nothing more was done.

On appeal, we were advised by the parties Rekdahl reached a settlement with Pittsburgh-Corning for $500,000. Under terms of the settlement, the entire

sum was allocated to pay one-half of the $1 million the jury awarded Sara Rekdahl for her loss of consortium claim. OI disputes the amount of the settlement and the propriety of its allocation to Mrs. Rekdahl's claim. Rekdahl had negotiated a $100,000 contingent settlement with Fibreboard, contingent upon Fibreboard prevailing in an action against its insurance carrier. OI argues Fibreboard has possibly settled with its carrier and the judgment should be setoff by the full $100,000. Additionally, the parties dispute whether OI is entitled to a setoff for an alleged claim made by Rekdahl with the JM Trust. These are all issues the parties addressed to the trial court.

In a letter to all parties, this court requested information on the status of the settlements. In response, defendants provided no new information. Rekdahl acknowledged that on November 7, 1994, he received from Fibreboard $40,000 of the $100,000. It seems that Rekdahl has been less than forthcoming in keeping defendants apprised of the status of this settlement and we are concerned with plaintiffs' lack of candor.

The settlement issue has remained unresolved for almost two and one-half years. We determine all documents regarding the settlements that are relevant to the issue of setoffs must be produced by Rekdahl, and issues regarding the propriety of settlement allocations and the amount of the setoff must be resolved. This matter must be remanded so that the trial court can make these determinations. We suggest the court may be assisted in its efforts by the decisions in Espinoza v. Machonga (1992) 9 Cal.App.4th 268, Hoch v. Allied-Signal, Inc. (1994) 24 Cal.App.4th 48, and Conrad v. Ball Corp. (1994) 24 Cal.App.4th 439.

3. The Award of Punitive Damages was Proper.

OCF and OI challenge the punitive damage award. They argue due process violations created by the assessment of punitive damages in mass tort litigation and the imposition of unfair procedures.

a. Standard of Review

"In assessing the propriety of a punitive damage award, as in assessing the propriety of any other judicial ruling based upon factual determinations, the evidence must be viewed in the light most favorable to the judgment. [Citation.]" (Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 819.)

"When faced with a challenge to the amount of a punitive damages award, our traditional function has been to determine whether the award is excessive as a matter of law or raises a presumption that it is the product of passion or prejudice." (Adams v. Murakami (1991) 54 Cal.3d 105, 109-110.) To make this determination, we consider three factors: (1) the reprehensibility of defendants' conduct, (2) the relationship between the punitive damage award and the compensatory damage award, and (3) the relationship between the punitive damage award and the defendants' wealth. (Id. at p. 110; see also Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 928.) Our review is guided by the purpose of punitive damages. "That purpose is a purely public one. The public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers. [Citation.]"

(Adams v. Murakami, supra, 54 Cal.3d at p. 110.) Our review is designed to ensure that the amount of punitive damages does not exceed the amount necessary to accomplish this objective. (Ibid.)

Applying these criteria to our case, we consider defendants' arguments.

b. Admission and Exclusion of Evidence

(1) Multiple Damage Awards and Polinsky Testimony

OCF and OI contend the trial court erred by excluding evidence of prior punitive damage awards assessed against defendants. Defendants argue their proffered evidence of punitive damage awards should have been admitted pursuant to Pacific Mutual Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 21-22, to permit the jury to consider the existence of other awards assessed against them so as to properly determine the size of a punitive damage award. Defendants further argue evidence of their significant liability would show the awarding of punitive damages in mass-tort litigation is inappropriate where the objectives of punishment and deterrence have been sufficiently met by prior damage awards. However, defendants' position is not supported by the record. Their argument on appeal differs substantially from that presented in the trial court, where defendants were permitted to offer evidence of prior punitive damage awards but not through expert witness testimony. It is interesting to note that in a February 23, 1995 post-oral argument letter to this court, OCF states, in relevant part:

"Also, many of the punitive damage judgments that are cited . . . [in] OCF's opening brief are included in the Clerk's Transcript . . .; the document in which these judgments are reflected was not, however, completed in time to be submitted to the jury."

The record reflects defendants argued two distinct positions in the trial court regarding the introduction of punitive damage evidence. First, defendants sought to have evidence of prior punitive damage awards, and testimony regarding the deterrent effect of those damage awards, presented through the expert witness testimony of Professor A. Mitchell Polinsky (Polinsky). Defendants asserted the testimony of Polinsky, an economist and law professor, would serve to introduce empirical data on the deterrent effect of multiple punitive damages in asbestos litigation, and explain defendants' risk of bankruptcy through multiple damage awards based on the number of pending cases.

Rekdahl opposed the introduction of Polinsky's testimony on the ground it was within the province of the jury to decide the deterrent effect of the award. When defendants discussed the amount of punitive damage awards that have been paid, the court stated, "[T]hat can be used . . . I am not saying the expert can use it. I am saying you could use it." When defendants responded, "I can't get it in if I don't have somebody to get up there and testify," Rekdahl offered to stipulate $1.9 million has been paid in punitive damages. The court only specifically excluded Polinsky from testifying as to prior awards as an improper subject of expert testimony.

Defendants then argued against allowing multiple punitive damages awards in tort litigation, and made a

motion which sought to exclude, as a matter of law, any consideration of a punitive damage award by the jury.[19] In the trial brief and in court, defendants argued they have been punished enough and that successive punitive damage awards in asbestos cases for the same conduct violated their due process rights and no longer served as a proper punishment or deterrent to their conduct. Defendants included in their brief the declaration of David L. Gray (Gray), OI's assistant secretary, who stated, inter alia, that OI was a named defendant in over 75,000 cases, and the amount of both compensatory and punitive damages awarded against OI exceeded several billion dollars. Gray further stated, in specified cases, OI was subjected to punitive damage verdicts in excess of $18 million.

In opposition, Rekdahl argued punitive damages was a proper issue for jury consideration and this position was supported by an asbestos litigation general order. Rekdahl also argued defendants never paid any punitive damages. Additionally, Rekdahl argued, the evidence in Gray's declaration was incompetent, and proof of prior punitive damage awards could be demonstrated by introducing copies of verdicts and cancelled checks. Defendants refuted Rekdahl's allegations and argued Gray's testimony was accurate, and if the court was concerned with the declaration, offered to have him testify in support of this motion.

The court agreed to consider Gray's testimony, but denied defendants' motion and stated: "First of all,

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[19] Defendants had also filed a motion in limine to exclude consideration of punitive damages.

while I think the matter may well be covered by the general order, I would deny the motion regardless of the general order. [¶] I think it is a case that allows punitive damages. And I think as a matter of law that the fact either of the parties have had to pay punitive damages in other instances is really irrelevant. [¶] It might be a matter, however, to go to the jury." However, defendants did not attempt to introduce any evidence of prior punitive damage awards presented in Gray's declaration.

According to this record, when defendants unsuccessfully attempted to have an expert introduce evidence of prior awards and explain the numbers to establish their deterrence value they then attempted to keep the punitive damage issue from even going to the jury. The trial court permitted introduction of evidence of the awards, but would not permit witness testimony to draw conclusions from the numbers.

As previously discussed, the trial court has broad discretion in admitting or excluding expert testimony. "Evidence Code section 801 limits the testimony of an expert to an opinion on '. . . a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. . . .' The trial court ruled the proffered testimony [to ascertain a sum sufficient to punish and deter] was an improper subject of expert testimony. The ruling was correct. The proffered testimony was in the form of an opinion by the expert on a matter that is within the common experience of lay jurors. If the jurors would be able to draw a conclusion from the facts testified to as easily and as intelligently as the expert, the opinion testimony of the expert is not admissible. [Citation.]"

(Westbrooks v. State of California (1985) 173 Cal.App.3d 1203, 1210.)

In our case, the trial court found the deterrent effect of punitive damages was not a proper subject for expert testimony. If defendants had introduced evidence of the amounts of previous awards, the jury could have considered these amounts along with information they received regarding defendants' financial condition, the number of pending asbestos cases, bankruptcy data, and testimony as to what the defendants could afford to pay in punitive damages, and ascertained a sum sufficient to punish and deter.

In reviewing the record, we do not find support for defendants' current argument the trial court excluded evidence of prior awards. In the 19 pages devoted to this issue in OI's opening brief, defendant failed to provide even one citation to the record to support its position. In OI's reply brief, defendant invited us to make a detailed review of the record, which we did. The record reveals that when defendants' punitive damage arguments are put in their proper context, the argued issue presented to the trial court of whether punitive damages should be given the jury, is not the issue presented to this court of whether defendants should have been allowed to present evidence of multiple damage awards that have been assessed against them. The trial court already answered that question.

(2) SEC Filing and Press Release

Contrary to OCF's assertions (and without proper record references), the court did not preclude the

defendant from admitting evidence of prior awards from the 1991 SEC filing (10-Q). This court has reviewed the document in question, including the portion in dispute, footnote 7.

The record reflects OCF requested the court allow defendant to read into evidence a lengthy footnote, prepared by counsel and added to OCF's 1991 SEC filing, claiming $38.9 million in punitive damages had been awarded against the company, including a $25 million award to a single plaintiff, that was subsequently reduced by the court to $2 million. Rekdahl interposed an objection based on hearsay and prejudice. The trial court found it prejudicial for the jury to hear the award was reduced by the court, but the fact that the obligation of OCF was $2 million would be admissible. The trial court stated: ". . . I would not allow you to get in that you have put in 38.9 million including 25 million award which ought to be off of the 38.9 million. [¶] I think that gives a totally false impression." The court correctly exercised its discretion in excluding this specific piece of prejudicial and misleading evidence. (Evid. Code, § 352.) OCF was permitted to introduce evidence of the $2 million award. OCF was permitted to introduce evidence of the 1991 SEC filing. If OCF chose not to introduce evidence of the $2 million award or have a witness submit to cross-examination on the content of footnote 7 and authenticate the document (and provide an exception to the hearsay rule), that is a decision of their own making. It does not form the basis for any alleged judicial error under Haslip or any other legal authority.

Additionally, OCF requested the trial court allow into evidence its own press release dated February 6, 1992,

which contained a consolidated statement of income and financial sheets stating that defendant took an $800 million noncash charge to accrue for future asbestos cases. OCF argued the document was credible and provided the latest information regarding the company's finances. Rekdahl objected on the ground the document was not a matter of public record and was inadmissible hearsay. The trial court sustained the objection. The record reflects OCF failed to present this court any argument or authority in contravention of the court's hearsay ruling. We will not consider the issue. (In re Marriage of Ananeh-Firempong (1990) 219 Cal.App.3d 272, 278.)

(3) Insurance Coverage

We do not address the merits of OI's argument the trial court erred by admitting evidence of insurance coverage because we find defendant waived this issue by its own conduct.

During discussion among the court and counsel about Polinsky, Rekdahl asserted if defendants were permitted to present evidence of other lawsuits and claims, he should be permitted to introduce their publicly filed SEC documents, which included information of insurance coverage. OI counsel responded: "And I don't mind the issues coming up about insurance. As I say, we are not covered for punitive damages, . . . So I don't mind the issue [Rekdahl] makes about the other lawsuits." However, when OI stated it would offer evidence of other claims as part of their financial condition, and Rekdahl said he intended to show OI had insurance coverage, OI then objected to the ad-

missibility of the insurance. The court found the insurance evidence admissible since OI was claiming damage.

OCF counsel then explained: ". . . I offer this for [Rekdahl] to consider, insurance for its number of cases pending, and I don't know what the California law is. That is usually what happens. [¶] You go to plaintiffs [sic] attorney. You say I got this issue of insurance. I don't want it coming in, you don't want the cases in, and we make a trade-off. [¶] That hadn't been done in this case. [¶] We [OCF and OI] did talk about it. But that is just what happens between lawyers in these cases." The court, expressing concern with its ruling, then stated: ". . . [I]f you bring in potential liability or actual liability in other cases, that the plaintiff can bring in evidence of insurance." OCF responded "I am comfortable and happy with that ruling," and OI stated: "And that will be competent evidence and not some argument. [¶] . . . . Anything in the financial statements can come in. If it is in the financial statements, that is a public document."

The facts concerning insurance coverage were contained in OI's SEC filings. OI argued the entire 100 plus pages of its 10-K should be given to the jury because the data in the document reflected the company's financial condition and OI wanted the jury to have "all of the facts." OI elicited testimony from its own expert, Michael Wagner, regarding its insurance coverage, and that the insurance was to cover compensatory damages. OI agreed to trade-off evidence of claims for evidence of insurance coverage. "Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal. This

application of the estoppel principle is generally known as the doctrine of invited error. [Citation.] [¶] If an appellant offers inadmissible matters into evidence, he cannot complain of its admission on appeal. [Citations.)" Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal.App.4th 1538, 1555.)

c. Substantial Evidence of Malice

OCF contends there was insufficient evidence of fraud or malice to support the jury's punitive damages award because there was uncontroverted evidence of the defendant's concern for the safety of its product and the welfare of its users. The contention is without merit.

OCF's argument is based on its own version of the facts presented at trial. Defendant draws our attention to evidence it considered favorable to its position and asks we reverse the verdict based on the strength of this evidence. (Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 402.) "[OCF] has a difficult hurdle to overcome: It must convince us of the absence of substantial evidence on which the jury could have based its verdict; a mere conflict of evidence will not suffice." (Ibid.)

"In assessing whether sufficient evidence was presented at trial . . ., reasonable presumptions generally favor the correctness of the verdict and the judgment. Thus, great weight is accorded the actions of the jury and the trial court. [Citation.]" (Liberty Transport, Inc. v. Harry W. Gorst Co. (1991) 229 Cal.App.3d 417, 437.)

"Punitive damages are appropriate if 'the defendant has been guilty of oppression, fraud, or malice . . . (Civ. Code, § 3294.) '[A] conscious disregard of the safety of others may constitute malice within the meaning of section 3294 of the Civil Code. In order to justify an award of punitive damages on this basis, the plaintiff must establish that the defendant was aware of the probable dangerous consequences of his conduct, and that he willfully and deliberately failed to avoid those consequences.' [Citation.)" (Hasson v. Ford Motor Co., supra, 32 Cal.3d at p. 402, fn. omitted.)

The record reflects, and witnesses testified, that it was well known in the industry in the 1930's that asbestos created a health hazard. OCF first learned in January 1941 (in correspondence from the Saranac Laboratory) that there were health hazards associated with the use and fabrication of asbestos, and of diagnosed cases of asbestos induced carcinoma among users of asbestos insulation products. A 1948 Saranac study showed that Kaylo inhalation was capable on prolonged inhalation of producing asbestos is and should be handled industrially as a hazardous dust. By the time OCF began distributing Kaylo in 1953, the company had knowledge of the link between asbestos exposure and cancer. OCF then purchased OI's Kaylo Division in 1958 and manufactured and marketed Kaylo without a warning. Between 1959 and 1966, OCF advertised Kaylo as non-toxic and assured workers the product was safe. OCF did not place warning labels on Kaylo because the product would then be difficult to sell. In 1970, an OCF physician recommended the warning label. OCF was prompted by OSHA in 1972 to place warnings on Kaylo. Shortly thereafter, OCF

substituted wood pulp for asbestos in its Kaylo. The record further reflects that even with the knowledge of hazards created by asbestos and its dust, OCF never conducted any tests to see how much dust was generated by its products.

Despite this evidence, OCF asks this court to set aside the punitive damages award. The jury judged the credibility of the witnesses and determined that despite OCF's knowledge of the health hazard associated with asbestos and Kaylo, the company refused to provide warning labels on the product, until forced to do so by the government. There was sufficient evidence of malice to support the award.

d. Constitutionality and Due Process

OCF and OI contend the court failed to comply with the mandates of Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, and the punitive damages award was the result of unfair procedure caused by arbitrary standards, lack of proper instruction, and inadequate post-judgment review. The contentions are without merit. The Second District, in Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1258-1259, fn. 8., has, in light of Haslip, upheld trial and appellate procedures in California for the award and review of punitive damages. We agree with the reasoning in Las Palmas.

In Haslip the United States Supreme Court "determined that the common law approach to awarding punitive damages was not per se unconstitutional. [Citation.] Under the common law method, '[T]he amount of the punitive damages is initially determined

by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.' [Citation.)" (Las Palmas Associates v. Las Palmas Center Associates, supra. 235 Cal.App.3d at p. 1256.)

First, Haslip held the system of awarding and reviewing punitive damage awards in Alabama provided Pacific Mutual due process. (Las Palmas Associates, supra, at p. 1256.) "The trial court there had instructed the jury on the purpose of punitive damages, that the making of an award was discretionary, and that the panel '"must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." [Citation.]' [Citation.)" (Ibid.)

Second, Haslip "noted that on a postverdict challenge to a punitive damage award, trial courts in Alabama are required to reflect on the record their reasons for either approving or disturbing the verdict." (Ibid.)

Finally, Haslip "pointed out that Alabama's Supreme Court measured punitive damage verdicts against a number of criteria 'to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." [Citations.]' [Citation.]" (Id. at p. 1257.)

(1) Instructions

We initially address defendants' contention the instructions were prejudicially erroneous and gave the jury "unbridled discretion" in determining the award.

(a) BAJI No. 14.72.1

OI first contends the court erred by instructing the jury with a modified version of BAJI No. 14.72.1 which defined "despicable conduct" as "conduct which is so contemptible that it would be looked down upon and despised by ordinary decent people." In BAJI No. 14.72.1, the instruction provides, in pertinent part, that "'[d]espicable conduct' is conduct which is so [vile,] [base,] [contemptible,] [miserable,] [wretched,] [or] [loathsome] that it would be looked down upon and despised by ordinary decent people." OI argues the "court, in giving an instruction defining 'despicable' by only a single pejorative, effectively removed from its instruction the full measure of reprehensibility that must attach to a defendant's conduct before it can properly be classified as 'despicable conduct,' and thereby lowered the jury's standard for awarding punitive damages." OI failed to support this argument or the assertion it interposed any objection in the court by any citations to the record. We will not make an independent search of the record. (Green v. Green, (1963) 215 Cal.App.2d 31, 35) OI is deemed to have waived this issue on appeal. (Niederer v. Ferreira (1987) 189 Cal.App.3d 1485, 1510.)

(b) BAJI 14.72.2

OI next contends the court improperly edited BAJI No. 14.72.2 by eliminating the terms "Whether punitive damages should be imposed, and if so, . . ." and "If you determine that punitive damages should be as-

sessed against a defendant, . . ." which gave the jury unfettered discretion to award or withhold punitive damages.[20] Again, OI fails to support this contention with any record references and effectively waives the issue. (Niederer v. Ferreira, supra, 189 Cal.App.3d at p. 1510.)

(c) Profitability

OI next contends the court erred by refusing to instruct the jury it should consider the profitability of defendant's misconduct in determining a punitive damages award.

At trial, the court denied OI's motion that the jury, in assessing punitive damages, should determine the company's financial condition only by considering the profitability of the Kaylo Division. The court then refused OI's Special Instruction No. 4, a modified version of BAJI No. 2.60 based on BAJI No. 14.72.2

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[20]The jury was instructed with a modified version of BAJI No. 14.72.2 (1989 Re-Revision) which provided: "You have determined that punitive damages are to be awarded against both OWENS ILLINOIS and OWENS CORNING FIBERGLAS for the sake of example and by way of punishment. The amount of punitive damages to be imposed is left to your sound discretion, exercised without passion or prejudice. [¶] In arriving at the amount of such award, you must consider: [¶] (1) The reprehensibility of the conduct of each defendant. [¶] (2) The amount of punitive damages which will have a deterrent effect on each defendant in light of such defendant's financial condition. [¶] (3) That the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff."

and Haslip on the grounds it was giving a BAJI instruction on the burden of proof.[21] The jury was in-

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[21] Special Instruction No. 4 provided: "You have determined to award punitive damages against defendant[s], for the sake of example and by way of punishment. The amount thereof is left to your sound discretion, exercised without passion or prejudice. [¶] In arriving at the amount of such an award, you must consider: [¶] (l) the relationship between the proposed punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; [¶] (2) the reprehensibility of the defendant's conduct; [¶] (3) the duration of the defendant's conduct; [¶] (4) the defendant's awareness, at the time of its wrongful conduct, of similar past conduct; [¶] (5) the defendant's concealment of similar past conduct; [¶] (6) the existence and frequency of similar past conduct by the defendant; [¶] (7) the profitability to the defendant of the wrongful conduct; (¶] (8) the financial position of the defendant; [¶] (9) all the costs of litigation to the defendant; [¶] (10) the existence of other civil awards against the defendant for the same conduct, these to be taken in mitigation; and [¶] (11) the amount of punitive damages which will have a deterrent effect on defendant in light of the defendant's financial condition. [¶] The amount of the punitive damages, if any, must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiffs. [¶] Plaintiffs have the burden of establishing the financial condition of the defendant by clear and convincing evidence. 'Clear and convincing' evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence. [¶] You should consider all (Footnote continued on next page.)

structed with BAJI No. 2.60.[22] The court permitted OI to show evidence of the lack of profitability of the Kaylo Division, which it did.

In Adams v. Murakami, supra, at pp. 110, 122-123, our Supreme Court ruled a plaintiff must show evidence of a defendant's financial condition before punitive damages can be imposed. However, the court refused to decide "whether evidence of a defendant's financial condition is a constitutional prerequisite under Haslip " (Id. at p. 118.) The court noted that while "[v]arious measures of a defendant's ability to pay a punitive damages award have been suggested. . . . We decline at present, however, to prescribe any rigid standard for measuring a defendant's ability to pay." (Id. at p. 116, fn 7.)

In Cummings Medical Corp. v. Occupational Medical Corp. (1992) 10 Cal.App.4th 1291, 1298, the appellate court held "where the defendant has been guilty of fraud, punitive damages may properly be based on evidence of the profitability of the defendant's misconduct." However, the court also stated:

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[22] BAJI No. 2.60 (as modified) stated: "As to each defendant, the plaintiff has the burden of proving by a preponderance of the evidence all of the facts necessary to establish: [¶] (l) the amount of punitive damages to be assessed against each defendant. [¶] 'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who has the burden of proving it. [¶] You should consider all of the evidence bearing upon every issue regardless of who produced it."

"This is not meant to imply punitive damages resulting from fraudulent conduct are limited to the profit defendant obtained through its misconduct. We only hold punitive damages calculated on the basis of the profitability of the defendant's fraudulent conduct satisfy the requirement the trier of fact consider the financial condition of the particular defendant. [Citation.]" (Id. at p. 1300, fn 8.) In Cummings, the only evidence of financial condition was the profitability of the fraudulent conduct. (Id. at p. 1301.)

Rekdahl presented evidence of OI's financial condition through the defendant's mandatory 10-K filings with the SEC, and the testimony of an expert who explained the company's assets, liabilities, net worth, annual income, borrowing power, cash in bank, and the lost profits from Kaylo. Based on these facts, the requirements of Adams and Haslip were met when the jury was instructed it must consider defendant's financial condition. The trial court was not required to use OI's preferred "profitability" standard.[23]

Regardless of defendants' specific arguments, the record reflects the Rekdahl jury was given appropriate guidelines to award punitive damages. As in Las Palmas, "the jury was instructed that an award of punitive damages was discretionary, and could only be made if they found [defendants] guilty of . . . fraud, or malice. Additionally, the court informed the panel that punitive damages are awarded 'for the sake of example and by way of punishment.'" (235 Cal.App.3d at

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[23] OCF's instructional argument, similar to that presented by OI, is incorporated into this analysis.

p. 1257.) The trial court also instructed the jury with BAJI No. 14.72.2 that they were to consider the deterrent effect of an award, defendant's financial condition, the reprehensibility of defendant's conduct, and the reasonable relationship between the injury and the amount of punitive damages. (Ibid.) "The California instructions go somewhat beyond the Alabama instructions approved in Haslip by explicitly . . . directing the jury to fashion an award bearing a relationship to the actual harm and to consider the defendant's financial condition in determining whether the award is sufficient to punish and deter." (Boyle v. Lorimar Productions, Inc. (9th Cir. 1994) 13 F.3d 1357, 1360.) As explained in Las Palmas, "these instructions offer the same degree of protection against arbitrary jury decisions as found constitutionally acceptable in Haslip." (235 Cal.App.3d at p. 1257.)

(2) Post-Trial Review

OCF contends the level and standard of review given by the courts to punitive damages awards is insufficient under Haslip. Based on the facts of this case, we disagree.

OCF first argues that California courts, in reviewing punitive damages awards, apply a "passion and prejudice" standard that was discredited in Haslip. (See Pacific Mut. Life Ins. Co. v. Haslip, supra, 499 U.S. at p. 21 fn. 10; Boyle v. Lorimar Productions, supra, 13 F.3d at p. 1360, see Adams v. Murakami, supra,

54 Cal.3d at p. 118 fn. 9.)[24] "It is true that a California court may set aside a punitive damage award only where the award 'appears excessive, or . . . is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice.' (Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910 . . . ." (Boyle v. Lorimar Productions Inc., supra, 13 F.3d at p. 1360.) Our Supreme Court declined to decide whether the "passion or prejudice" standard was constitutionally sufficient under Haslip. (Adams v. Murakami, supra, 54 Cal.3d at pp. 118-119, fn. 9.)

In Las Palmas, the court determined that "the 'passion and prejudice' standard of posttrial and appellate review required by California law does afford [defendants] an additional safeguard to ensure that the jury's award has not exceeded '"an amount that will accomplish society's goals of punishment and deterrence."' [Citation.]" (235 Cal.App.3d at p. 1257.) The Las

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[24] We additionally note that in Haslip the U.S. Supreme Court "rejected the suggestion the standard of proof [to determine punitive damages] ought to be by 'clear and convincing' evidence, satisfied the prevailing standard in Alabama, 'reasonably satisfied from the evidence,' was constitutionally sufficient. [Citation.] [¶] Thus, bound as we are by precedent and the doctrine of stare decisis, we are compelled to find punitive damages do not violate the federal constitution as a matter of law. [Citation.] [¶] Moreover, because of California's higher standard of proof by 'clear and convincing evidence' and objective criteria for determining the propriety and amount of an award, awards of punitive damages in this state have sufficient procedural safeguards to satisfy due process. [Citations.]" (Liberty Transport, Inc. v. Harry W. Gorst Co., supra, 229 Cal.App.3d at p. 441.)

Palmas court further noted that the "application of the 'passion and prejudice' standard does not occur in a vacuum, but is measured against the identical criteria utilized by the jury: reprehensibility of defendant's misdeeds, the ratio between the compensatory and punitive damages, and the relationship between the punitive damages and the defendant's net worth. (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d 910, 928; Adams v. Murakami, supra, 54 Cal.3d 105, 110-111; . . . .) This quantum of critical evaluation thus makes certain that punitive damage verdicts will be limited to that amount of money necessary to accomplish the public policy of punishment and deterrence. In sum, the 'passion and prejudice' test affords in posttrial proceedings and on appeal the same general degree of scrutiny as found in the Alabama review process. [Citation.)" (Id. at p. 1258.)

OCF next argues the trial court failed to engage in any substantive on-the-record review of the punitive damages award. Again, we disagree.

The posttrial review conducted by the trial court, in this case, did more to ensure due process than the posttrial review in Haslip. In Haslip, the trial court's punitive damage award carried a "'presumption of correctness.'" (Pacific Mut. Life Ins. Co. v. Haslip, supra, 499 U.S. at p.56, dis. opinion of O'Connor, J.) By contrast, in California, the trial court "sits not in an appellate capacity but as an independent trier of fact." (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d at p. 933.) In this capacity, "'[t]he trial court may disbelieve witnesses, reweigh evidence and draw reasonable inferences that are contrary to those drawn by

the jury.' [Citation.)" (Sanchez v. Hasencamp (1980) 107 Cal.App.3d 935, 944.)

As to an "on-the-record" review of the award, the court in Las Palmas correctly noted that "[u]nlike in Alabama, California law does not mandate that the trial court state on the record why it refused to interfere with the award. . . . While an explanation of the trial court's decision to uphold the verdict would give an added degree of protection, we think, on the whole, California law affords defendants enough safeguards to satisfy the requirements of due process." (235 Cal.App.3d at p. 1258, fn. 8.)

In our case, the trial court conducted a post-verdict review of the award (and other issues) by providing a hearing on defendants' post-verdict motions, listening to extensive arguments, and then taking the matter under submission for further review. Defendants' have not argued this hearing was in any way deficient. This procedure has been found constitutionally sufficient by the United States Supreme Court in TXO Production Corp. v. Alliance Resources Corp. (1993) ___ U.S. ___ [113 S.Ct. 2711, 2724) who, in reviewing a punitive damage award and the surrounding court procedures stated, in relevant part: "The only basis for criticizing the trial judge's review of the punitive damages award is that he did not articulate his reasons for upholding it. He did, however, give counsel an adequate hearing on TXO's postverdict motions, ... [Citation.] While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient despatch [sic] of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his

denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation."

In our case, we have reviewed the evidence and testimony regarding OCF and OI's conduct, taken notice of the testimony regarding defendants' financial condition, and considered the compensatory damages awarded Rekdahl. We also reviewed the jury instructions, the trial court's evidentiary rulings, and the due process afforded defendants by virtue of the instructions and the court's proper use of standards for review. We find the California procedures used in this case afforded OCF and OI appropriate due process considerations, in conformance with Haslip and TXO. The procedures did not provide the jury unguided discretion in determining the amount of the punitive damage award. The award is not "grossly excessive", so as to conclude that it was the result of "passion or prejudice."

4. Proposition 51 is Applicable in This Case.

In a cross-appeal, Rekdahl contends the trial court erred in ruling Proposition 51 applied to asbestos cases, and in applying General Order 37.01 (re actual date of injury).

We reject Rekdahl's argument for three reasons.

First, Rekdahl asks this court to address the issue of when a cause of action accrues in asbestos cases. The premise of the argument is that the date of Rekdahl's "injury" should be calculated starting from the date of his initial exposure to asbestos fibers. Rekdahl argues that exposure, and therefore, "injury," occurred between 1951 and 1972, well before the passage of

Proposition 51 in June 1986. To support his position, Rekdahl relied on the appellate court decisions in Coughlin v. Owens-Illinois, Inc. (1993) 26 Cal.App.4th 1511 (reprinted for tracking purposes at 31 Cal.App.4th 1633) and Armstrong World Industries Inc. v. Aetna Casualty & Surety Co. (1993) 20 Cal.App.4th 296 (reprinted for tracking purposes at 25 Cal.App.4th 1316). However, our Supreme Court granted petitions for review as to these decisions, and the cases can neither be cited nor relied upon to support Rekdahl's argument. Rekdahl has failed to provide this court any additional authority we could use to resolve this issue.

Second, Rekdahl's argument was neither presented to nor considered by the trial court. "As a general rule issues not raised in the trial court cannot be raised for the first time on appeal. [Citation.] However, appellate courts have made exceptions to this rule where the issue involved an important question of public policy [citation]; where the issue raised a pure question of law, such as the interpretation and application of a statute [citation]; and where the issue involved a new point of law decided while the appeal was pending [citation]." (Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal.App.4th 976, 998-999, overruled on other grounds in Lakin v. Watkins Associated Industries (1993) 6 Cal.4th 644, 664.) In our case, the issue of the accrual date of the injury is a question of law (though there are facts in dispute), but it is a question currently pending before our Supreme Court.

Third, and perhaps most dispositive of the issue, Rekdahl waived any objection to the use of Proposition 51 by agreeing to its applicability in this case. In a

discussion of motions filed in the trial court, the following colloquoy took place: "MR. RINGWOOD: The last of the already filed motions, and I know Mr. Davis mentioned we have other matters to raise, and I agree, is the motion on Proposition 51 and its application on this case. [¶] I would defer to Mr. Howarth. [¶] MR. HOWARTH: I have looked at the papers and I don't see any disagreement that Prop 51 is applicable to this case, which was filed well after the 1986 applicability date. [¶] If there is no debate on that, I do not need to burden the record. [¶] THE COURT: Any Question? [¶] MR. DAVIS: No." The record reflects Rekdahl failed to object when the court determined Proposition 51 was applicable in this case.

Accordingly, we will not consider the merits of Rekdahl's cross-appeal. The trial court properly applied the tenants of Proposition 51 in this case.

5. Conclusion

The trial court properly denied defendants' motions for a judgment notwithstanding the verdict and for a new trial.

"When presented with a motion for a JNOV, the trial court 'cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] "A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evi-

dence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied." [Citation.]' [Citation.)" (Wright v. City of Los Angeles (1990) 219 Cal.App.3d 318, 343.)

In their motions, defendants argued insufficiency of the evidence to support liability and the punitive damage award, in addition to evidentiary errors. We have reviewed the entire record and have determined there was sufficient evidence to support the jury's verdicts. There was evidence defendants knew the dangers of asbestos, advertised Kaylo as a safe and "non-toxic" product, continued to manufacture and supply a hazardous product, and failed to provide warning labels. The matter was properly submitted to the jury and we cannot substitute our own deductions. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 874.)

On a motion for a new trial, the reviewing court will not interfere with a trial court's denial of the motion unless there is shown a clear abuse of discretion. (Cansdale v. Board of Administration (1976) 59 Cal.App.3d 656, 667.) All presumptions are in favor of the order, and the showing of abuse of discretion must be manifest and unmistakable. (Miller v. National American Life Ins. Co. (1976) 54 Cal.App.3d 331, 345.)

In their motions, defendants argued evidentiary and procedural errors we have addressed in our opinion. As stated, we find no abuse of discretion.

DISPOSITION

The matter is remanded to the trial court for a hearing, with factual and legal findings, only on the issue

of setoffs against the judgment for pretrial settlements and, if required, a recalculation of the judgment and entry of an amended judgment. In all other respects, the judgments on the appeal and the cross-appeal are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

APPENDIX B
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
RETIRED JUDGE PROGRAM
( ) PRIVATE (X) COURT

* * * * * *

MONTY REKDAHL and SARA REKDAHL

vs.

OWENS-CORNING FIBERGLAS, et al.

Counsel for Plaintiff	Counsel for Defendant
DAVIS & THOMAS BY: JOSEPH DANIEL DAVIS THOMAS D. THOMAS	WRIGHT, ROBINSON, MCCAMMON, OSTHIMER & TATUM BY: ROBERT A. RICH HOWARTH & SMITH BY: DONALD HOWARTH

POST TRIAL PROCEEDINGS

1. Motion for Order Granting New Trial.
2. Motion for Judgment notwithstanding the verdict.

The court having previously taken the motions under submission after argument by counsel now denies both motions in their entirety.

A copy of this minute order is mailed to all counsel by United States Mail this date as indicated below:

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Date: May 18, 1992

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION THREE
[Filed June 20, 1995]

MONTY J. REKDAHL and SARA M. REKDAHL Plaintiffs, Cross-Appellants and Respondents,	)	2d Civil No. B068259 (Super. Ct. No. BC029051)
v.	)	ORDER MODIFYING OPINION AND DENYING REHEARING
OWENS-CORNING FIBERGLAS CORPORATION and OWENS-ILLINOIS, INC., Defendants-Cross-	)	NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on May 25, 1995, be modified in the following particulars:

1. On page 39, one line 8 of the second paragraph, insert the following citation:

> cf. Magallanes v. Superior Court (1985) 167 Cal.App.3d 878, 884-890, holding that punitive damages may not be imposed in a market share liability case.

2. On page 85, after the end of the paragraph at top of page, add the following text:

Even if we consider OI's contention, we find it without merit. "It is . . . well settled a party has the right to have a jury instructed on his or her theory of the case, but has no right to require the court use any particular phraseology; as long as the court correctly instructs on the issue, it is free to modify an instruction or give one of its own in lieu of the one offered. [Citations.] The appellate court must examine all the circumstances of the case, including the evidence and the other instructions given, in order to determine whether the probable effect of specific instructions has been to mislead the jury and thus to prejudice a party. [Citation.]" (Byrum v. Brand (1990) 219 Cal.App.3d 926, 939.)

In our case, BAJI 13,72.1 contained several words that could be used to describe or define despicable conduct. The use of the disjunctive "or" in the instructions gave the trial judge discretion to choose the pejorative from among the alternatives that best fit the circumstances. That is what the court did. In considering the evidence and other instructions given, we find the word contemptible is commonly understood, requires no further clarification, and its use neither misled the jury or caused any prejudice to OI.

3. On page 85, in section "(b) BAJI 14.72.2", delete the second sentence and replace with the following text:

These deletions, OI argued, impermissibly deleted the phrases dealing with the jury's discretion to determine whether punitive damages should be awarded. Aside from the fact the argument is without merit, OI again fails to support this contention with any record

references and effectively waives the issue. (Neiderer v. Ferreira, supra, 189 Cal.App.3d at p. 1510.)

Even if we consider OI's contention, the record reflects the modified version of BAJI No. 14.72.2 (1989 Re-revision) was given to the jury in Phase 3, after the jury determined in Phase 2 that punitive damages should be awarded. The only issue in Phase 3 was "How much." Accordingly, there was no error.

4. On page 86, footnote 21, add the following line at the end of the footnote:

of the evidence bearing upon every issue regardless of who produced it."

Appellants' petitions for rehearing are denied.

There is no change in judgment.

APPENDIX D

Second Appellate District,
Division Three, No. B068259
IN THE SUPREME COURT OF
CALIFORNIA
[Filed August 24, 1995]

MONTY J. REKDAHL Et Al., Respondents

v.

OWENS-CORNING FIBERGLAS CORPORATION
Et Al., Appellants

Petitions for review DENIED.

LUCAS
Chief Justice

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Nos. 95-797; 95-818

Supreme Court, U.S.
FILED
DEC 21 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

MONTY J. REKDAHL, et al.,
Respondents.

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

vs.

MONTY J. REKDAHL, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Does the Due Process Clause permit the admission of evidence of the defendants' financial condition to guide the jury in assessing the amount necessary to punish and deter, and to allow meaningful review of the reasonableness of the amount of the punitive damages awarded?

2. Does the Due Process Clause require a court, when reviewing a punitive damages award for excessiveness, to consider and/or set aside punitive damages awards imposed against the defendants *when they declined to present evidence in the trial court of prior awards made and paid*?

3. Is the amount of the first awards of punitive damages in California asbestos litigation reasonable (a) in light of the defendants' reprehensible death-dealing conduct through which, knowing full well the dangers of asbestos, the defendants advertised their product as safe and "non-toxic," continued to manufacture and supply a hazardous product, and failed to provide warning labels, and (b) when compared to the extraordinary wealth of each defendant?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-797
No. 95-818

OWENS-ILLINOIS, INC.,
OWENS-CORNING FIBERGLAS CORPORATION,
Petitioners,

v.

MONTY J. REKDAHL, et al.,
Respondents.

On Petition for Writ of Certiorari to the \
California Court of Appeal,
Second Appellate District, Division Three

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents, Monty J. Rekdahl and Sara M. Rekdahl submit a combined response to the Petitions for Writ of Certiorari submitted by Petitioners, Owens-Illinois, Inc. and Owens-Corning Fiberglas Corporation. The Rekdahls respectfully request that this Court deny the Petitions.

OPINIONS BELOW

The opinion and order of the California Court of Appeal and the order of the California Supreme Court denying review are not officially reported. The opinion and order are reproduced in the Appendices submitted with the Petitions of Owens-Illinois, Inc. [hereinafter OI] and Owens-Corning Fiberglas Corporation [hereinafter OCF].

JURISDICTION

Respondent adopts the Statement of Jurisdiction in the Petitions with this exception: The issue of whether the punitive damage awards violated due process because OI and OCF were subjected to prior awards of punitive damages for the same course of conduct was not presented to the trial court. Since the issue was not preserved for appellate review, the California Court of Appeal did not decide the question. The issue, therefore, is not properly presented to this Court. S. Ct. R. 10(c), 14(g).

STATEMENT

I. The Facts: This is the *first* punitive damages case in asbestos litigation in California.

Monty Rekdahl worked for the Navy at the Long Beach Naval Shipyard in the 1950's, and at a ship repair facility in Guam in the 1960's and early 1970's. His work exposed him to asbestos dust. In April of 1991, doctors diagnosed malignant mesothelioma, a fatal asbestos-related

cancer. (OI Appendix [hereinafter OI A.] 2a.) Soon after trial, Mr. Rekdahl died from the mesothelioma.[1]

Kaylo is pipe insulation which, until 1972, was reinforced with asbestos fibers. OI developed, produced and marketed Kaylo from 1943 to 1958. In 1953, OI entered into a distribution agreement with OCF whereby OCF would sell Kaylo. In 1958, OI sold its Kaylo Division to OCF. OCF marketed Kaylo as Kaylo, and under different names for other manufacturers. OCF also rebranded and sold asbestos-containing products under OCF's name. (OI A.4a n.3, 57a.) The defendants knew the dangers of asbestos, advertised Kaylo as a safe and "non-toxic" product, continued to manufacture and supply a hazardous product, and failed to provide warning labels. (OI A.69a.)

II. Trial Court Proceedings: The trifurcated trial commenced on January 21, 1992. In Phase I, the parties litigated the issues of causation and damages. The jury returned a special verdict finding Monty Rekdahl had a malignant mesothelioma caused by exposure to asbestos, and awarded him $964,219 in economic damages and $2.5 million in non-economic damages. The jury awarded Sara Rekdahl $1 million for her loss of consortium claim. (OI A.3a.)

The purpose of Phase II was to apportion liability and determine whether punitive damages should be imposed. OCF claims it introduced evidence showing that

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[1]Although Mr. Rekdahl has died, for simplicity's sake, we refer to the plaintiffs here as we did in the trial court as the Rekdahls.

its Kaylo complied with existing government and industry standards, and suggests it is thus immune from punitive damages.[2] (OCF Pet. 4, 6, 10.) The trial court explicitly found there was insufficient evidence to support the government contractor defense; the reviewing court agreed that appellants failed to provide the evidence required to establish this defense. (OI A.16a-17a.) As to industry standards, at trial, the evidence established that OCF never conducted any tests to determine just how much asbestos its products released into workers' breathing space. (Record [hereinafter R.] 1912.) Obviously, without testing, OCF could not know whether it met any kind of standards.

OCF also contends it complied with OSHA warning label requirements before they went into effect in 1971-1972. (OCF Pet. 10.) The fact is that OCF, knowing full well it was exposing users to horrible diseases, did not

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[2]OCF describes the proceedings in the Court of Appeal and California Supreme Court in terms of its arguments rather than the record where the evidence might be found. (OCF Pet. 4-7.) This Court's rules require citation "to the places in the record where the matter appear so as to show the federal question was timely and properly raised . . . ." S. Ct. R. 14(g).

We remind OCF that argument of counsel is not evidence. *See, e.g., Dameshghi v. Texaco Ref. & Mktg., Inc.*, 3 Cal. App. 4th 1262, 1283, 6 Cal. Rptr. 2d 515 (1992). We object to OCF's one-sided portrayal of the case. Under California law evidence is reviewed in the light most favorable to the prevailing party. *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 101 Cal. Rptr. 568 (1972). The reviewing court accepts respondent's evidence as true, resolves all conflicts in respondent's favor, and draws all favorable inferences that may reasonably be drawn in favor of the respondent. *Hasson v. Ford Motor Co.*, 19 Cal. 3d 530, 544, 138 Cal. Rptr. 705, 714 (1977)

label its products until prompted by OSHA in 1972 (R.2135), just before OCF substituted wood pulp for asbestos in Kaylo, and long after Monty Rekdahl was exposed to Kaylo OCF distributed without any warning whatsoever. (OI A.57a.) The truth is that OCF did not place labels on its products warning that asbestos causes disease because doing so would have put the manufacturer at a competitive disadvantage: "You would have a little harder selling job." (R.1921.)

On special verdict, the jury found that OI's and OCF's Kaylo was defective, and the defect was the legal cause of Monty Rekdahl's injury. The jury apportioned liability 42.5 percent to OI, 42.5 percent to OCF, and the remainder to other culpable entities. The jury further found by clear and convincing evidence that OCF and OI acted with malice or fraud and that punitive damages should be imposed on OI and OCF. (OI A.3a-4a.)

In Phase III, the only issue was, "How much?" (OI A.73a.) The trial court ruled that the defendants could introduce evidence of the profitability of Kaylo, the imposition of punitive damage awards by other juries, and the possibility of potential future claims. Neither defendant offered admissible evidence of prior punitive damages awards. (OI A.52a; R.4280, 4297-98, 4301-04.) The jury imposed punitive damages of $4 million against OI and $4 million against OCF. (OI A.4a.)

III. The Appeals: After examining the entire record, the California Court of Appeal held (1) there was substantial evidence both defendants deliberately exposed Monty Rekdahl to products they knew caused cancer and

other asbestos-related diseases (OI A.56a-58a); (2) the award satisfied due process because:

(a) the trial court properly instructed the jury with California pattern instructions that go beyond the Alabama instructions this Court approved in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (OI A.59a-63a);

(b) California's standard of review meets the criteria established in *Haslip*, the defendants took full advantage of California's posttrial review procedures, including review in the trial court which exceeded that in *Haslip*, and was constitutionally sufficient under *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2724 (1993) (*OI A.*63a-66a); and thus (c):

> California procedures used in this case afforded OCF and OI appropriate due process considerations, in conformance with *Haslip* and *TXO*. The procedures did not provide the jury unguided discretion in determining the amount of the punitive damage award. The award is not "grossly excessive," so as to conclude that it was the result of "passion or prejudice."

(OI A.67a.)

Both defendants filed petitions for rehearing which were denied. (OI A.71a-73a.) Both defendants sought review in the California Court; not a single justice voted to hear the case. (OI A.91a.)

REASONS FOR DENYING THE WRIT

OI and OCF contend that this case presents unsettled questions concerning the proper legal analysis for determining whether successive jury awards of punitive damages are constitutionally impermissible. OI also asks the Court to determine whether a jury may consider a defendant's wealth in determining punitive damages.

The defendants have waived any right to complain to this Court about successive punitive damage awards because neither of them presented any admissible evidence in the trial court of prior punitive damages awards imposed and paid. As a consequence, the issue was not preserved for review in the California Court of Appeal, and could not properly be presented for review to the California Supreme Court. Neither the California Court of Appeal nor the California Supreme Court decided an important federal question. S. Ct. R. 10(b), (c), 14(g). This -- the first award of punitive damages in asbestos litigation in California -- is not in need of the Court's attention.

Asbestos companies have already sought and been denied certiorari on the same issues raised here.[3] The petitions in the instant case should also be denied.

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[3]*See, e.g., Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683, *cert. denied*, 113 S. Ct. 2335 (1993); *Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill. App. 3d 425, 599 N.E.2d 129, *cert. denied*, 113 S. Ct. 2335 (1993); *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

I. DEFENDANTS' PERCEPTIONS ABOUT PUNITIVE DAMAGES ARE NOT SUPPORTED BY EMPIRICAL STUDIES

OI commences its petition with a sweeping attack on punitive damages based upon gross statistics. (OI Pet. 5-6.) OI's argument does little more than illustrate the adage that one can prove anything with statistics. T. Melsheimer, S. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 S.M.U. L. Rev. 329, 331-332 (1994) (punitive damages in personal injury cases has changed very little in 25 years). OCF mounts a similar, though less defined, attack. (OCF Pet. 12.) When subjected to critical analysis, both assaults fail.

Punitive damages have both critics and adherents. Opponents, relying primarily on anecdotal accounts, characterize punitive damages as out of control with respect to frequency and amount, and warn that they represent a crushing effect on large corporations like OI and OCF who must also pay compensatory damages in thousands of cases.[4] *See*, T. Schwartz, *Punitive Damages and Regulated*

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[4]OI claims it has been sued by tens of thousands of persons claiming to have been injured by exposure to Kaylo. (OI Pet. 3.) This claim is not substantiated by the record on appeal. OCF also claims it has been sued by hundreds of thousands of persons for injuries caused by its Kaylo. (OCF Pet. 3.) OCF submitted no proof of these assertions in the trial court although it made unsubstantiated claims in briefs to the Court of Appeal.

At trial, both defendants fought hard and long to keep evidence of prior punitive damages awards out of evidence. Furthermore, there was no evidence that either defendant had ever paid *any* punitive damages. (OI App. 50a-52a & n.19.)

Regulated Products, 42 Am. U. L. Rev. 1335, 1356-58 (1993) [hereinafter Schwartz]. Of course, the reason there are so many lawsuits against OI and OCF is *because* they deliberately engaged in an egregious pattern of misconduct over many, many years and destroyed the lives of thousands of persons exposed to their toxic products -- including California citizens like Monty Rekdahl.

Proponents of punitive damages explain that "[t]he history of the rise of the doctrine of punitive damages is a part of the struggle of individuals to preserve their rights against the mighty." M. Rustad, T. Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1285 (1993). Exemplary damages are necessary to punish and deter in order to protect the consuming public from egregious corporate misconduct.[5] *Id.* at 1310, 1312. Punitive damages imposed because of injury to many, many persons affected by corporate misconduct will necessarily be greater than an award rendered for a single plaintiff in a single action. *Cf., Delos v. Farmers Ins. Group, Inc.*, 93 Cal. App. 3d 642, 667, 155 Cal. Rptr. 843 (1979).

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[5]As many as 200,000 persons will die from asbestos-related diseases by the end of this century. S. Labotan, *Judges' Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, N.Y. Times, July 30, 1991. Many of these deaths, including Monty Rekdahl's, resulted from manufacturers' active concealment of the dangers of asbestos.

Of course, as the persons exposed to OI and OCF asbestos products die off from age and illness, the number of cases actually prosecuted against asbestos manufacturers will rapidly abate. At trial, the evidence established that the number of annual filings is declining. (R.4213-25.)

Empirical studies show that the anecdotal accounts cited by the media and critics are anomalies and, in reality, punitive damages are granted with striking rarity to individuals in product liability suits against manufacturers,[6] and when they are, the sums awarded tend to be modest, especially when posttrial adjustments are taken into account.[7] Schwartz, 42 Am. U. L. Rev. at 1358 & nn.

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[6]OI concedes that juries do not routinely award punitive damages, pointing out that most juries have not imposed punitive damages against OI, and noting on the same evidence one jury awarded punitive damages but the second did not. (OI Pet. at 9 n.7.)

[7]A very recent Justice Department study showed that punitive damages are awarded in only a tiny fraction of civil cases and half are for less than $52,000. In a study of state civil suits in the nation's 75 largest counties, Justice Department's Bureau of Justice Statistics found that in 1992 there were 762,000 civil suits involving torts, contracts and real property rights. The overwhelming majority of cases, 750,000, never reached a jury. Jurors ruled on only 12,000 cases. In those, the plaintiffs won 6,200 and lost 5,800. Punitive damages were awarded in only 364 cases, or six percent. U.S. Dept. of Justice, Bureau of Justice Statistics, Special Report 1 (July 1995). Similar findings were reported by the National Center for State Courts, *Litigation Dimensions: Torts and Contracts in Large Urban Courts*, 19 State Ct. J. 23, 27-29 (1995). Little has changed since an earlier study revealed that between 1974 and 1990 there were 161,686 product liability cases in the federal system and many more in the state system. Yet, there were only 355 cases in which punitive damages were awarded. Schwartz, 42 Am. U. L. Rev. at 1358-59 & nn. 148-51.

Indeed, in the very study OI cites to support its claim that punitive damages are out of control in California (OI Pet. 6), the authors found just the opposite: Punitive damages awards in personal injury cases were fewer than in other classes of litigation. M. Peterson, S. Sarma, M. Shanley, *Punitive Damages, Empirical*

(continued...)

148-51. The media seldom report on reductions or eliminations of these awards during posttrial proceedings. Schwartz, 42 Am. U. L. Rev. at 1359. California trial courts and reviewing courts do reduce excessive punitive damages, and the larger the award the greater the remittitur. Rand at 28; *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (reviewing court reduced excessive punitive damages from $125 million to $3.5 million).

As one of America's beloved philosophers warned, "If it ain't broke, don't fix it." *See, S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 360, 256 Cal. Rptr. 543 (1989) (Kaufman, J., dissenting) (quoting Will Rogers). The California system of punitive damages provides procedural and substantive due process in excess of this Court's mandates in *Haslip, TXO and Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). It does not need fixing.

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[7](...continued)
Findings, Rand Inst. for Civ. Just. iii-iv (1987) [hereinafter Rand]; *accord*, T. Melsheimer, S. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 S.M.U. L. Rev. at 331-32. The authors in the Rand study "did not find an epidemic of punitive awards in products cases . . . ." Rand at 13; *see also*, W. Pittman, B. Nettles, *Debate: What Is the Role or Function of Punitive Damages?* 24 Cumb. L. Rev. 451, 456-57 (1993) (reporting similar findings in Alabama). The public perception that punitive damages means big numbers is not supported by the data. In fact, the largest punitive damage award for a San Francisco personal injury was in the early *1960's*; it had a 1984 value of $1.6 million. *Id.* at 17, 22. Punitive damage awards in personal injury and product cases are not "skyrocketing." (OCF Pet. at 12.)

II. EVIDENCE OF THE DEFENDANTS' WEALTH HELPS THE JURY DETERMINE THE AMOUNT OF PUNITIVE DAMAGES AND ASSISTS THE REVIEWING COURT EVALUATE THEIR REASONABLENESS

OI urges this Court to grant certiorari to determine whether evidence of a defendant's wealth is admissible in a punitive damages case. (OI at 8-9, 15-16.) The plaintiffs maintain that California properly allows admission of evidence of the defendant's wealth to guide the jury in determining how much is necessary to punish and to deter, and to assist the reviewing court in evaluating the reasonableness of the sum awarded.

In *Haslip*, this Court viewed the "financial position" of the defendant as a key factor in determining the reasonableness of a punitive award. *Haslip*, 49 U.S. at 22. In *TXO*, the Court did not squarely approve admission of evidence of the financial condition of the defendant, but did not criticize the fact that the defendant's wealth is a factor "typically considered in assessing punitive damages," and noted that many states permit the jury to take account of the defendant's wealth.[8] *TXO*, 113 S. Ct. at 2722 & n.28, 2723 & n.31. A defendant's wealth is merely one aspect of its financial condition, and is permissible post-*Haslip*. *Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1475 (10th Cir. 1995).

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[8]Forty-three states allow evidence of financial condition for the jury to consider in assessing punitive damages and, as in California, many states *require* the introduction of such evidence. T. Melsheimer, S. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 S.M.U. L. Rev. at 337 n.44.

California has recognized that *Haslip* presents a "clear constitutional mandate for meaningful judicial scrutiny of punitive damage awards." *Adams v. Murakami*, 54 Cal. 3d 105, 118, 284 Cal. Rptr. 318 (1991). The *Adams* court held that a plaintiff must present evidence of a defendant's financial condition so (1) the jury can make a rational award of damages, and (2) the reviewing court can evaluate the reasonableness of the award. *Id.* at 110, 122-23. The court declined to prescribe any rigid standard for measuring a defendant's ability to pay. *Id.* at 116 n.7.

In *Cummings Medical Corp. v. Occupational Medical Corp.*, 10 Cal. App. 4th 1291, 1298, 13 Cal. Rptr. 2d 585 (1992), the appellate court held that punitive damages may properly be based on evidence of a defendant's gain from its misconduct. However, the court cautioned that its holding was not to be construed to mean that profitability was the only means by which the trier of fact could calculate punitive damages. *Id.* at 1300 n.8.

Punitive damages are supposed to sting. Otherwise, they are insufficient to fulfill the twin goals of retribution and deterrence. Evidence of the financial condition of the defendant is necessary to guide the jury in deciding how much is necessary to punish and deter. *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 148 Cal. Rptr. 389 (1978); *Delos v. Farmers Ins. Group, Inc.*, 93 Cal. App. 3d at 667 (award which is insufficient to punish and deter just as legally unsound as one which overpunishes). Evidence of financial condition enables the reviewing court to evaluate whether the amount the jury assessed is reasonably calculated to satisfy those goals without overpunishing. *Adams*, 54 Cal. 3d at 118; J. Mallor, B. Roberts, *Punitive*

Damages: Toward a Principled Approach, 31 Hastings L.J. 639, 648-49 (1980).

OI asserts that it is particularly egregious to punish an out-of-state corporation for its misconduct in California by assessing damages based upon the corporation's financial success in "unrelated endeavors." (OI Pet. at 15-16.) There are two answers. First, the out-of-state corporation placed its defective products into California's stream of commerce, and those products killed a California citizen. Second, that same out-of-state corporation still sells its products and generates profits from doing business in the State. Surely OI's success in "unrelated endeavors" is partly owing to the fact it has availed itself of the huge California market. Having taken advantage of the California economic market then and now, OI should not be heard to complain that it has to pay punitive damages in California.

OI next complains that the trial court refused to give instructions limiting consideration of defendant's wealth to the actual profit OI expected to reap from Kaylo. (OI Pet. at 16-17.) That is true. The court refused to do so because such an instruction is contrary to California law. (OI A.62a-63a.) But, despite OI's contention, the record reflects the Rekdahl jury was given appropriate guidelines to award punitive damages. California pattern instructions go beyond the Alabama instructions the Court approved in *Haslip* by explicitly directing the jury to fashion an award bearing a relationship to the actual harm and to consider the defendant's financial condition in determining whether the award is sufficient to punish and deter. *Boyle v. Lorimar Productions, Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994); *Las Palmas Associates v. Las Palmas Center*

Associates, 235 Cal. App. 3d 1220, 1257, 1 Cal. Rptr. 2d 301 (1991) ("these instructions offer the same degree of protection against arbitrary jury decisions as found constitutionally acceptable in *Haslip*").

In the instant case, the Rekdahls presented evidence of OI's (and OCF's) financial condition, including assets, net worth, cash, and so on; OI presented evidence of its alleged lost profits from Kaylo. The reviewing court held that the requirements of *Adams* and *Haslip* were met when the jury was instructed to consider defendant's financial condition. The trial court was not required to use OI's preferred "profitability" standard. (OI A.63a & n.23.) The instructions given guided the jury's deliberations in conformance with *Haslip* and *TXO*, (OI A.67a.)

"[A] punitive damage award is excessive if it is disproportionate to the defendant's ability to pay." *Adams*, 54 Cal. 3d at 112. The amounts of punitive damages were reasonable when considered in juxtaposition with the financial position of each defendant. Both are multi-billion dollar, multi-national corporations with annual incomes counted in the millions of dollars and rising asset and stock values. (R.4182-92, 4204-10.) Both have millions of dollars in unexhausted insurance to cover future claims. (R. 4318-20, 4360, 4365-66.) A $4 million punitive damage award may force OI and OCF to sit up and take notice, but it surely is not excessive when compared to the corporations' incredible wealth and decades-long, death-dealing misconduct.

On this record, there is no need for the Court's intervention. The Rekdahls ask the Court to deny the petitions.

III. THERE WAS NO SUBSTANTIVE DUE PROCESS VIOLATION BECAUSE NEITHER OI NOR OCF INTRODUCED EVIDENCE IN THIS CASE OF ASSESSED AND PAID PUNITIVE DAMAGES IN PRIOR CASES

OI and OCF complain that repeated punishment for their past misdeeds violates principles of substantive due process. Both argue that juries in many cases have imposed punitive damages on them. (OI Pet. 9; OCF Pet. 11.)

The Rekdahls will make three points. First, the issue is not properly before this Court because the defendants elected not to raise it in the trial court, did not preserve the issue for review in the Court of Appeal, and thus could not properly raise it in the California Supreme Court.[9]

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[9]Neither defendant presented proof in the trial court that it ever *paid* a dime punitive damages *prior* to those imposed in the instant case. OI cites to an unpublished opinion as evidence that a jury awarded $250,000 in punitive damages against it, but the citation does not support the claim. (OI Pet. 9 n.7.) OI also cites *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1289 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990), as a case wherein the reviewing court affirmed $1.8 million in two cases. (OI Pet. 9 n. 7.) OI presented no evidence of this matter at trial; it is unknown whether it ever *paid* the judgment.

OCF claims that as of February 1994, 38 juries imposed $77 million in punitive damages. (OCF Pet. 3.) Apparently, since the verdict in this case was rendered in 1992, OCF has included the damages awarded here. Presumably it also included a $25 million jury award in *Dunn v. HOVIC*, 1 F.3d 1371, which was remitted to $1 million. (R.4342-49; OI A.53a-54a.) As of March of 1992, OCF represented to the public in its SEC filings that it had not paid any of

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Second, under California law, the amount of punitive damages deemed necessary to punish and deter is determined at the time of trial, in this case March of 1992. Accordingly, the defendants' claim to substantive due process violations must be evaluated in light of the sums needed to punish and deter in 1992.

Third, the Rekdahls agree that sometime, somewhere, juries will have imposed exemplary damages in an aggregate sum sufficient to punish and deter, the defendants will introduce competent evidence of amounts they have paid, and any further awards will violate substantive due process. That day has not yet arrived -- or at least had not arrived when the Rekdahl matter was tried.

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[9](...continued)
the awards against it, did not claim at trial that it had ever paid any punitive damages, does not provide data to this Court indicating what happened to the awards in posttrial proceedings, and still does not say how much, if anything, it paid in punitive damages prior to 1992 or since.

At trial, the evidence established that both companies are paying less per asbestos claim now than in the past, and both expect to pay less per claim in the future. (R.4253.) The amount of insurance available to OI and OCF is sufficient to pay off all claims at these values. (R.4253-59.) In this Court, however, OCF laments the fact it purportedly has taken a charge against earnings to cover potential future liability for uninsured costs. (OCF Pet. 3.) A "charge against earnings" is merely a bookkeeping device by which a company creates a paper reserve to provide for possible future liabilities. It does not mean that OCF must pay, has paid, or will pay, anything at all. The "charge" does have the attractive advantage of being a tax deduction. (R.4326-28.)

A. The Defendants Did Not Preserve the Issue of Successive Punitive Damages Awards for Review by This Court

OI and OCF have waived any error relating to the issue of successive punitive damages.

Under the Court's rules, a petitioner must cite to the portion of the record where the challenged matter appears in order to show that the federal question was timely and properly raised. S. Ct. R. 14(g). Further, the Court has traditionally declined to review "a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground." *Sochor v. Florida,* 112 S. Ct. 2114, 2119 (1992) (failure to object to jury instruction precluded review); *cf., Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973) (states afforded wide latitude in developing procedural rules).

In California, an issue not preserved in the trial court will not be considered by the Court of Appeal, and a theory not raised in the trial court cannot be asserted for the first time on appeal.[10] *Ernst v. Searle*, 218 Cal. 233, 240-41, 22 P.2d 715 (1933); *North Coast Business Park v. Nielsen Const. Co.*, 17 Cal. App. 4th 22, 28-29, 21 Cal. Rptr. 2d 104 (1993). Where a deliberate trial strategy results in an outcome disappointing to the advocate, the

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[10]The rule is the same in other jurisdictions. In *Johnson v. Celotex Corp.*, 899 F.2d at 1287, the court declined to consider the argument of one defendant that multiple imposition of punitive damages for the same course of conduct violated due process because the defendant did not raise the issue in the trial court.

lawyer may not later use that tactical decision as the basis to claim prejudicial error on appeal. *Mesecher v. County of San Diego*, 9 Cal. App. 4th 1677, 1686, 12 Cal. Rptr. 2d 279 (1992); and see, *Pat Rose & Assoc. v. Coombe*, 225 Cal. App. 3d 9, 23-24, 275 Cal. Rptr. 1 (1990) (failure to present evidence on an issue is waiver of claim of error on that issue on appeal).[11]

In this case, the defendants argued in the Court of Appeal that (1) the trial court erroneously excluded evidence of prior punitive damage awards assessed against them, (2) their proffered evidence should have been admitted to permit the jury to consider other awards assessed against them, and (3) evidence of their significant liability would show the awarding of punitive damages in mass-tort litigation is inappropriate where the objectives of punishment and deterrence had already been met by prior damages awards. (OI A.49a-50a.) But, the Court rejected the arguments because defendants' position was not supported by the record. (OI A.50a.)

What really happened is that the defendants wished to introduce evidence of punitive damages awards, and testimony regarding the deterrent effect of those awards, *through an expert*. The trial court excluded admission of the evidence through the expert, but told the defendants, "[Y]ou can use it." (OI A.50a-51a.) Thereafter, as a matter of trial strategy, defendants argued *against* allowing evidence of multiple punitive damage awards in tort litigation, made a motion to exclude any consideration of

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[11]Disapproved on other grounds in *Adams v. Murakami*, 54 Cal. 3d at 116.

prior awards by the jury, and did not offer any evidence of prior punitive damage awards. (OI A.51a-52a.) The reviewing court rejected the defendants' attempt to argue one way in the trial court, and another way in the reviewing court:

> The record reveals that when defendants' punitive damage arguments are put in their proper context, the argued issue presented to the trial court of whether punitive damages should be given the jury, is *not* the issue presented to this court of whether defendants should have been allowed to present evidence of multiple damage awards that have been assessed against them.

(OI A.53a (emphasis added).)

If an issue is not preserved in the trial court, and therefore not passed on by the Court of Appeal, the California Supreme Court will not consider the issue either. *Tiernan v. Trustees*, 33 Cal. 3d 211, 221 n.15, 188 Cal. Rptr. 115 (1982) (court would not consider theory contemplating facts not presented at trial). OI and OCF claim they raised the issue in the California Court of Appeal and the California Supreme Court. (OI Pet. 4; OCF Pet. 5, 7.) However, the defendants did not -- and could not -- *properly* raise a due process claim with respect to successive punitive damage awards because they did not preserve the issue in the trial court. The defendants may not by-pass a state court procedure by not offering evidence, then argue that the result is substantively unconstitutional. *See, Yee v. City of Escondido*, 112 S. Ct. 1522, 1528-29 (1992).

In *Johnson v. Celotex*, 899 F.2d 1281, OI advised the trial court of punitive damages awards made, but not paid in two prior cases. However, OI did not provide any documentation as to exactly how much money it actually paid in punitive damages. Therefore, the record was insufficient to permit an examination of OI's claim that there was a multiple award of punitive damages offensive to the fundamental fairness inherent in due process. *Id.* at 1287-88.

In this case, since the defendants by-passed state procedure by not offering evidence of prior punitive damage awards, they cannot comply with this Court's rule requiring reference to the record where the perceived error was preserved. S. Ct. R. 14(g). The record is insufficient to permit examination of their due process claim. In *TXO*, the Court declined to consider an issue not properly presented to the highest state court. 113 S. Ct. at 2723-24. As in *TXO*, the Rekdahls ask the Court not to pass on the issue. Out of the proverbial abundance of caution, however, plaintiffs address the defendants' arguments.

B. Successive Punitive Damages Are Not Per Se Unconstitutional

Both defendants challenge the constitutionality of successive awards of punitive damages.

Every court that has considered the question has concluded the Fourteenth Amendment does not insulate a manufacturer of a defective product from successive punitive damage awards based on the marketing of the product. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d at 808-09; *Dunn v. HOVIC*, 1 F.2d at 1385-

86; *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1096-97 (5th Cir.), *cert. denied*, 112 S. Ct. 1778 (1991); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022, 1031-33, *cert. denied*, 497 U.S. 1057 (1990); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-83 (2d Cir.), *cert. dism.*, 497 U.S. 1057 (1990).

OI complains that California courts have completely failed to consider whether aggregate punitive damages violate due process. (OI Pet. 13.) This simply is not true. In *Grimshaw v. Ford Motor Co.*, the reviewing court expressed the policy of this State. If defendants are confronted with the possibility of a punitive award in a subsequent case for the same conduct, the defendant can raise the issue of successive awards in the next case. 19 Cal. App. 3d at 812; see also, *Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 889-90, 213 Cal. Rptr. 547 (1985) (expressing concern over possibility of repeated punitive damage awards in market share cases).

OI also suggests that the California courts erroneously hold that the issue of repetitive punitive damages awards is simply a factor the jury can consider. If the reviewing courts conducted the initial analysis, they would be obliged to hold that OI could not be subjected to yet another punitive damage award. (OI Pet. at 13-15.) What OI forgets is that since it presented no admissible evidence of repetitive awards or payments of punitive damages in the trial court, there was nothing for the reviewing court to review, with or without the jury's consideration of the point. (OI A.53a.)

The Rekdahls have no quarrel with the general principle that the amount of punitive damages paid in the

past may be a relevant factor a jury could consider in assessing punitive damages in a particular case. Nonetheless, the Rekdahls maintain that in order to preserve the twin goals of deterrence and punishment, the defendants must present competent evidence that they have paid prior awards, and those payments were sufficient to punish and deter. (R.4122-23.) If, having heard that evidence, the jury nonetheless imposes additional damages, the reviewing court can undertake a meaningful inquiry -- based on the evidence -- into the issue of whether past awards and payments of punitive damages were indeed sufficient to punish and deter and another award would violate due process.

This is the approach adopted by the Second Circuit in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277. In *Simpson*, defendant Pittsburgh Corning sought to avoid a punitive damage award based on a claim it had already paid punitive damages for the same course of conduct. *Id.* at p. 280. The reviewing court disagreed. Assuming that a civil litigant has a due process right to protection from repetitive punitive damage assessments, the defendant could make such a showing in one of two ways. In the "single punitive award" approach, the defendant could show it had previously been punished for the full extent of its wrongful conduct, not merely that it had been *assessed* a sum appropriate to punish it for injuries to particular plaintiffs. Or, under the "aggregate punitive award" approach, the defendant could show that the sum of all punitive damages awards it had paid reached the maximum tolerable under the due process clause. Since the defendant presented no proof of either alternative, the court rejected its claim. *Id.* at 280-81; *see also, Kochan v. Owens-Corning Fiberglas*

Corp., 610 N.E.2d at 694 (defendant bears burden of proof on this question).[12]

Inasmuch as the defendants presented no proof of either alternative, the California Court of Appeal rejected their claim. The Rekdahls ask this Court to do the same.

C. At the Time of Trial Neither Defendant Had Actually Paid Any Punitive Damages

In California, the reasonableness of the amount of punitive damages is measured against the defendant's financial condition at the time of trial. *Mariott v. Williams*, 152 Cal. 705, 710, 93 P. 875 (1908); *Washington v. Farlice*, 1 Cal. App. 4th 766, 777, 2 Cal. Rptr. 2d 607 (1991).

At the time of trial, OCF represented to the whole world in its public filings with the SEC that *all* of the punitive awards against OCF were on appeal, and the company believed *all* of them would be vacated on appeal. (R.4342-44, 4346.) Obviously, OCF could not make a legitimate claim at the time of trial that it had paid punitive

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[12]OI states the burden is on the plaintiff to prove a negative, that is, the total amount of punitive damages assessed against the defendant in prior cases does not exceed a reasonable amount. (OI Pet. at 12-13.) Although OI cites *Haslip*, 499 U.S. at 21, in support of the assertion, the Court did not so hold. When the issue has been raised, reviewing courts have universally placed this burden on the defendant. Implicit in the Court of Appeal's opinion here is that defendants bear the burden of producing evidence showing they have been sufficiently punished. (OI A.52a ("defendants did not try to introduce any evidence of prior punitive damages . . . .").)

judgments in a sum sufficient to punish and deter. OI elected not to introduce competent evidence that it had paid any punitive damage awards.

Someday, the defendants will actually pay punitive damages. Somewhere, in some case, they will present to the finder-of-fact competent evidence of those payments. The day will come when the fact finder will say, "enough" -- OI and OCF have paid sufficient punitive damages to satisfy society's goals of deterrence and retribution for their egregious course of misconduct which cost so many so much pain, suffering, and death. The day will come when a reviewing court will have admissible, competent evidence in the record on appeal from which it can conclude that yet another award would be constitutionally intolerable.

But in this case, as of March of 1992, OCF asserted in public SEC documents, which were admitted into evidence, that it had not paid, and did not expect to pay in the future, any punitive damages. Although less clear with respect to OI, it introduced no evidence on the issue. Since punitive damages are measured by the defendants' financial condition at the time of trial, and the properly instructed jury did just that, there is nothing for this Court to review.

IV. EVEN IF THIS COURT DECIDES *BMW* FAVORABLY TO THAT DEFENDANT, THE JUDGMENTS IN THIS CASE WILL NOT CHANGE

Both defendants profess to find great similarities between this case and *BMW of North America v. Gore*. The issues in *BMW* bear little resemblance to the issues OI and OCF will raise in this Court. First, in *BMW*, the Alabama jury awarded punitive damages based not on the defendant's fraud against a single plaintiff, but upon the multiple frauds involved in refinished vehicles sold throughout the United States. By contrast, California jury instructions, which were given here, make it clear that the jury could punish the defendants only for their reprehensible conduct against the individual plaintiff. (R.2236-37 (punitive damages must bear reasonable relation to damage "actually suffered by the plaintiff").)

Second, the relationship between punitive damages in the *Rekdahl* case is nowhere near 500 times the amount of compensatory damages it was in *BMW*. The Rekdahls' compensatory damages were nearly $4.5 million. Punitive damages imposed on each defendant were $4 million. Since punitive damages are assessed individually, the ratio of punitive damages to compensatory damages is slightly less than 1 to 1.

Third, OCF's claim that it is insulated from punitive damages because its conduct matches that of BMW (i.e., OCF labeled its Kaylo and otherwise complied with industry standards) is not supported by the record or case law. (Pet. 10.) Before 1972, OCF *never* warned that exposure to its products could cause disease. (R.2729-30.) There were no federal regulations at all, and no state

regulations in states where Mr. Rekdahl used OCF products. The "American Conference of Governmental Industrial Hygienists" cited by OCF as evidence of compliance with government standards was merely a voluntary group of interested persons who met periodically to make recommendations concerning industrial hygiene.[13] (R.2029.) *See, Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). In addition, OCF did not conduct any tests to see if dust levels generated by the use of Kaylo fell within voluntary limits suggested by the Conference. (R.1920-21, 2033.) Tests conducted by outsiders revealed substantially higher counts than those recommended by the American Conference.[14] (R.2206; Rekdahl Ex. 141.)

Even *if* there had been government and industry standards, and even *if* OCF had complied with them, it would not be immune from punitive damages under California law. One reason punitive damages developed is *because* "[g]overnmental safety standards and the criminal

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[13]In 1946, this volunteer organization recommended that as a threshold limit value (TLV), workers should not be exposed to asbestos-laden dust which exceeded 5 million parts per cubic foot (MPPCF) of air. (R.2029-30.) However, as early as 1947, it was known in the industry that exposure limited to 5 MPPCF did not assure safety. (R.2008.)

[14]Aetna Insurance did a study in an OCF factory in 1958. The samplers found dust counts of 91.8, 41, and numerous others over 5 MPPCF. (R.2053, 2146, 2206.) The factory had these very high dust counts despite the presence of ventilators and respirators. Field workers, like Mr. Rekdahl and others, did not have ventilators and exhaust systems. (R.2206, 2054.)

law have failed to provide adequate consumer protection against the manufacturer and distribution of defective products." *Grimshaw*, 119 Cal. App. 3d at 810.

Finally, from what members of bench and bar could glean from the tenor of argument in *BMW*, the punitive damages issues which appeared to concern the Court in *BMW* are totally different from the issues OI and OCF have raised here. *BMW* provides no reason for certiorari in this case.

Both defendants suggest that this Court should grant and hold the petitions until its decision in *BMW*. OI asks the Court to vacate the judgment, and remand the case to the California Court of Appeal for reconsideration of this Court's ruling in *BMW*. A remand in light of *BMW* on the issue of multiple awards would not affect the judgments because neither OI nor OCF offered evidence on that issue. Simply put, there is nothing for the Court of Appeal to review anew.[15] Since there is no evidence to re-review, the Court may rest assured that if it remands the case, the

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[15] "Delay of justice is injustice." *People v. Hartman*, 170 Cal. App. 3d 572, 216 Cal. Rptr. 641 (1985). From notice of appeal in California (6/12/92) to petition for certiorari in this Court (11/21/95), the appeals process consumed nearly three and one-half years. Much of the delay was caused by the defendants' procedural ploys in the Court of Appeal, including repeated requests for extensions of time to file briefs and for continuances of oral argument. After obtaining extensions, defendants routinely waited until the very last day to perform every act required during the appellate process. While plaintiffs recognize the defense entitlement to invoke legal means to postpone payment of the judgment, ethically and morally it is difficult to justify such deliberate and avoidable delays in the appellate processes.

result will be the same, another round of appeals will ensue and this Court can expect to see the same matter sometime in 1998 or 1999. The Rekdahls asks this Court to deny the petitions so that society's goals of punishment and deterrence finally may be satisfied.

CONCLUSION

Justice Potter Stewart declared that due process simply means that the litigant be given "'the opportunity to be heard' . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The trial court gave defendants that opportunity; they declined to take advantage of it. *A fortiori*, the defendants waived any claim of error with respect to successive punitive damages awards in the California Court of Appeal, the California Supreme Court, and in this Court. There is nothing for this Court to review.

"[W]hen our neighbors do wrong, we sometimes feel the fitness of making them smart for it, whether they have repented or not." O.W. Holmes, Jr., *The Common Law* 45 (1881). It is time for petitioners to pay. Respondents ask the Court to deny the petitions for review so that they may at long last put this matter to rest.

December 11, 1995

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No. 95-818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

MONTY J. REKDAHL, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents misapprehend the nature of the question presented in the petition. Instead of the evidentiary issue addressed by respondents, the question on which Owens-Corning Fiberglas Corporation ("OCF") seeks review is whether the punitive damages award imposed in this case is excessive in violation of the Due Process Clause. *See* Pet. i. That question was properly raised in the trial court, the Court of Appeal, and the Supreme Court of California. Respondents' contentions to the contrary are without merit.

1. Respondents devote considerable effort to their

discussion of an evidentiary issue resolved by the Court of Appeal. *See, e.g.*, Br. in Opp. 18-21. That issue involved the admissibility at trial of certain evidence pertaining to the deterrent effect of other punitive damages awards. In respondents' view, the trial court's exclusion of that evidence, and the asserted absence of other such evidence before the jury, indicates that the question presented in the petition was not properly preserved below.

Respondents' waiver argument rests on two assumptions: first, that OCF's due process claim presented in the petition is nothing more than a *per se* challenge to the constitutionality of imposing multiple punitive awards for the same course of conduct; and second, that OCF's due process claim cannot be considered by the courts unless evidence of prior punitive awards was presented to the jury. Neither of those assumptions is accurate.

As the petition makes clear, the question presented in the petition is whether the punitive damages award imposed in this case is unconstitutionally excessive in violation of the Due Process Clause. *See* Pet. i, 9-12. That question was clearly and explicitly raised by OCF in the trial court, in the Court of Appeal, and in the Supreme Court of California. *See* Pet. 4-7 (citing and quoting portions of record where OCF raised this issue).[1] It is therefore properly before this Court.

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[1]Respondents make the bizarre assertion (Br. in Opp. 4 n.2) that it was somehow improper for OCF to quote the portions of its briefs where this federal question was raised below. Needless to say, respondents' assertion rests on a fundamental misunder-

[Footnote continued on next page]

Respondents misconstrue that question in characterizing it as nothing more than a claim that successive awards of punitive damages are *per se* unconstitutional. *See* Br. in Opp. 18, 21-25, 28. OCF's fundamental contention is that the punitive damage award is grossly excessive, and therefore violative of due process, in view of all the relevant factors presented to the courts below. Those factors include the evidence of OCF's compliance with industry and government safety standards (Pet. 10-11) and the obvious and undisputed potential for multiple awards of punitive damages arising out of the same course of conduct (Pet. 11). Those very same factors are also present in the *BMW* case, and are explicitly relied upon by the petitioner in that case as grounds for concluding that the punitive damage award at issue there is unconstitutionally excessive. *See* Pet. 10-11. The propriety of holding this case pending the disposition of *BMW* is therefore clear, because the Court's analysis of the excessiveness issue and of those factors in *BMW* could provide important guidance regarding the proper analysis of those same

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standing of this Court's Rule 14.1(g)(i). That Rule requires petitioners seeking review of state court decisions to provide pertinent quotations from the record "so as to show that the federal question was timely and properly raised." *Id.* Obviously, compliance with that Rule requires citation to and quotation from the pleadings in which the petitioning party asserted the federal question below. OCF fully complied with the letter and spirit of the Rule by citing to and quoting from its briefs below.

factors by the California courts.

Respondents also err in assuming that OCF's due process claim cannot be considered unless evidence of prior punitive damages awards was presented to the jury. In the first place, no such evidence was presented to the jury in the *BMW* case; indeed, no such evidence could have been presented, because no prior punitive damage awards had been imposed on the petitioner in that case. The factor relied upon by the petitioner in *BMW* is instead the obvious potential for multiple punitive awards in the mass tort context (*see, e.g., BMW* Pet. Br. 45-50); precisely that same factor is present in this case, as even respondents concede (Br. in Opp. 25).[2]

Second, evidence of the mass-tort nature of this case and the clear potential for massive damages awards

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[2]Respondents' insistence on the presentation of such evidence to the jury appears to rest on the assumption that courts considering claims of excessiveness are precluded from considering matters not presented to the jury. The question of excessiveness is one of law for the court, however, not a factual issue for determination by the jury. For that reason, other California courts look to damage awards in other cases in considering whether a particular award is excessive, without regard to whether those other awards were presented to the jury at trial. *See, e.g., Las Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App. 3d 1220, 1259 n.9, 1 Cal. Rptr. 2d 301 (1991); *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 155 Cal. App. 3d 381, 393-96, 202 Cal. Rptr. 204 (1984); *see also Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 888, 213 Cal. Rptr. 547 (1985) (barring punitive damages in part based on counsel's statement "at oral argument that there are hundreds of [similar] cases pending nationwide").

was properly presented to the lower courts. OCF's motion for remittitur and new trial included excerpts from its 1991 Form 10-K showing *inter alia* that OCF had taken an $800 million charge against future earnings in that year alone to reflect the estimated *uninsured* cost of future awards in asbestos cases. *See* C.A. Rec. 3181 & n.3, 3202-05. In addition, material submitted to the trial court by *respondents* revealed that 85,000 asbestos claims were pending against OCF at the end of 1991. C.A. Rec. 3513.

OCF presented similar evidence to the Court of Appeal, and also identified for that court all of the punitive damages awards previously imposed on OCF in asbestos cases. *See* Pet. 3; OCF C.A. Br. 58-59 n.24 (citing 23 cases in which more than $49.5 million in punitive damages judgments had been entered against OCF);[3] *id.* at 57 & Addendum A (citing and attaching OCF's 1993 First Quarter Form 10-Q, which showed that OCF had taken an aggregate charge against earnings of $943 million to reflect the estimated uninsured costs of asbestos litigation through 1999); OCF C.A.

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[3]Respondents err in suggesting that this total included amounts (such as the $25 million awarded by the jury in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993)) that had been reduced on appeal when OCF's briefs were filed below. To the contrary, the totals set forth in OCF's briefs did not include any remitted or reversed portions of the punitive damages awards at issue. Since the time those briefs were filed, of course, a few of these awards have been remitted or reversed, but many additional awards have been imposed on OCF; the current total is in excess of $100 million.

Reply Br. 28-29 nn.7-8 (citing an additional 15 cases in which punitive damages awards totaling more than $21 million had been imposed).

Respondents filed a motion to strike all references to this material from OCF's briefs, claiming that it was not properly before the Court of Appeal. OCF filed a response to that motion, explaining that, under California law, this material was the proper subject of judicial notice and was therefore appropriate for consideration by the Court of Appeal. *See* Opposition of OCF to Rekdahls' Motion to Strike Portions of OCF's Opening Brief at 5-11 (citing, *inter alia*, *Gilmore v. Superior Court*, 230 Cal. App. 3d 416, 281 Cal. Rptr. 343 (1991); Cal. Evid. Code § 452(a) & (h)).

The Court of Appeal did *not* grant respondents' motion to strike. Thus, OCF's showing of past punitive awards and the financial impact of asbestos litigation was properly before the Court of Appeal when it made its decision, and those matters are part of the record in this case. Respondents' waiver argument would therefore be incorrect on its own terms even if the issue of unconstitutional excessiveness were not a question of law for the courts to decide.

2. Respondents also err in attempting to deny the existence of evidence demonstrating OCF's compliance with government and industry safety standards. As OCF explained to the Court of Appeal, it began placing warning labels on Kaylo boxes in 1966, and revised those warnings in 1970. OCF C.A. Br. 68 (citing OCF Exh. AA-118; Tr. 2725-26, 2728). OCF knew that its Kaylo product contained a low percentage of asbestos and did not produce as much dust as other

asbestos products. OCF C.A. Br. 68-69 (citing OCF Exh. 985; Tr. 2288-89). As even respondents' experts conceded at trial, moreover, it was generally believed in the scientific community that asbestos products were safe if exposure levels were kept below the Threshold Limit Value ("TLV") established by the American Conference of Governmental Industrial Hygienists and adopted by several States, including Ohio (where OCF's headquarters are located), New Jersey (where OCF manufactured Kaylo), and California. OCF C.A. Br. 69 (citing Tr. 2145-48, 2270-72, 2297, 2300-01).

Laboratory tests of Kaylo performed in 1955 had shown no increased risk of tumorous growth at exposure levels far in excess of the TLV. OCF C.A. Br. 69 (citing Tr. 2291-97, 2303). Moreover, even respondents' expert conceded that between 1938 and 1968 a "reasonable body of medical authority" believed that installers of asbestos insulation products like Kaylo were, on average, exposed to levels of asbestos lower than the TLV. OCF C.A. Br. 70 (citing Tr. 2300, 2658-59). The same was true *a fortiori* for bystanders (like respondent Monty Rekdahl) who did not themselves work directly with asbestos insulation. OCF C.A. Br. 70 (citing Tr. 2300-01).

Studies conducted by third parties confirmed that the dust raised by the ordinary cutting and handling of Kaylo did not exceed TLV standards. OCF C.A. Br. 70 (citing OCF Exh. AA-62).[4] Indeed, respondents'

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[4]Respondents claim (Br. in Opp. 4) that OCF did not conduct any of its own tests, but ignore the fact that tests conducted by outsiders showed that Kaylo could be manufactured and

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own expert conceded that the accepted scientific literature was to the same effect. OCF C.A. Br. 70 (citing Tr. 2300). In short, OCF introduced substantial evidence of its compliance with contemporary government and industry safety standards, and respondents' contentions to the contrary are without merit.

3. As noted in the petition (Pet. 11-12), this Court's grant of a stay in this case demonstrates the propriety of holding the petition pending the Court's disposition of *BMW*. Respondents offer no basis for their contrary conclusion.[5] The fact that the ratio of punitive damages to actual damages in *BMW* is higher than it is in this case is beside the point, because this Court has already indicated that such ratios are not dispositive under the Due Process Clause. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). Instead, the Court's resolution of the excessiveness issue in *BMW* is likely to turn in large part on its analysis of many of the same factors at issue here, and thus a remand for reconsideration of the judgment below will almost certainly be appropriate if

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handled without creating average asbestos exposures in excess of the TLV. Respondents point to a study conducted by Aetna in 1958 (*see* Br. in Opp. 27 n.14), but that study (which was in fact conducted for Owens-Illinois) showed that dust levels were below the TLV in most work areas.

[5]Nor do they even attempt to refute OCF's showing (Pet. 13-14) that the judgment below conflicts with the Third Circuit's decision in *Dunn v. HOVIC*. The existence of that conflict further demonstrates the certworthiness of this petition.

the Court resolves the excessiveness issue in favor of the petitioner in *BMW*.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held and then disposed of in light of this Court's disposition of *BMW of North America, Inc. v. Gore*, No. 94-896.

January 3, 1996

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